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No. 12575

9648

**United States
Court of Appeals**
for the Ninth Circuit.

JOHN H. FAHEY, et al.,

Appellants,

vs.

RONALD WALKER, Special Master,

Appellee,

and

FEDERAL HOME LOAN BANK OF SAN
FRANCISCO,

Appellant,

vs.

RONALD WALKER, Special Master,

Appellee.

Transcript of Record

Appeals from the United States District Court,
Southern District of California,
Central Division.

FILED

JUL -5 1951

PAUL A. O'BRIEN

No. 12575

United States
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for the Ninth Circuit.

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Appellants,

vs.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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For Long Beach Federal Savings and Loan Association, Cross - Claimant and Third - Party Plaintiff:

CHARLES K. CHAPMAN,
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Long Beach, Calif.

In the District Court of the United States, Southern
District of California, Central Division

Civil No. 5421-P.H.

PAUL MALLONEE, et al.,

Plaintiffs,

vs.

JOHN H. FAHEY, et al.,

Defendants.

ORDER OF REFERENCE TO
SPECIAL MASTER

An order of the above-entitled Court having been made on the 23rd day of January, 1948, effectuating the resolution and order of the Home Loan Bank Board No. 388, dated January 17, 1948, rescinding the conservatorship of the Long Beach Federal Savings and Loan Association and ordering, among other things, the time, place and manner in which said conservatorship shall be terminated, and the management and control of said Association and the assets thereof returned to the Board of Directors of said Association, the holding of a special election of a board of directors and officers of said Association, the form and method of accounting to be made by said conservator to said Association and to the Court, and other matters, and it appearing that exceptional conditions require the appointment of a Special Master to aid and assist in effectuating said order in that the transfer and delivery of the assets of the said Association from the possession

of the defendant A. V. Ammann to the possession of the officers and directors of the Association is a task of considerable consequence that will require the constant attention and full-time services of an officer of the Court familiar with the involved and extended litigation and its complexities, and that the effectuation of such transfer without damaging the financial reputation of the Association is important to the community, for the [4708*] Association has some 16,000 member-savers and some 8,000 member-borrowers, receives savings of the public, and has assets allegedly totaling some twenty-six million dollars; and the Court further finds that in view of the extended and complex litigation, friction and disagreement will be extremely difficult to avoid and would imperil the financial reputation of the Association and the interests of its shareholders.

It further appears to the Court that because of the extreme complexity of the problems to be determined by such Special Master, it is to the best interests of all of the parties litigant that said Special Master should be one familiar with all of the multi-fold phases of said litigation from its inception. The Court has, therefore, on its own motion and initiative and without the suggestion of any other person, requested Ronald Walker, Esq., to assume such duties. Each of the principal parties to this action, insofar as it concerns the conservatorship of said Long Beach Federal Savings and Loan Association, has expressed its willingness that Ronald Walker act in such capacity, such consent having been expressed as follows:

*Page numbering appearing at foot of page of original Certified Transcript of Record.

By Wyckoff Westover, Esq., on behalf of the plaintiffs Paul Mallonee, et al.

By Charles K. Chapman, Esq., on behalf of the Long Beach Federal Savings and Loan Association.

By Hon. James Carter, United States Attorney, on behalf of the defendants John H. Fahey, individually and as former Federal Home Loan Bank Commissioner; A. V. Ammann, individually and as conservator for the Long Beach Federal Savings and Loan Association; all the defendant Government officials, the Home Loan Bank Board, and its predecessor Government agencies and officials.

By W. F. McKenna, Esq., on behalf of the Home Loan Bank Board.

It Is, Therefore, Ordered, Adjudged and Decreed:

1. That Ronald Walker, Esq., be and he hereby is appointed as Special Master in the above-entitled action, to conduct and regulate all proceedings by the parties litigant, or others, pursuant to [4709] said order that the conservator for the Long Beach Federal Savings and Loan Association be removed and its assets returned to the directors and officers of the Association, a copy of which said order is appended hereto and by this reference made a part hereof.

2. That said Special Master shall determine the methods of and regulate and supervise the turning over of the assets of the Long Beach Federal Sav-

ings and Loan Association by the conservator to the Board of Directors of said Association and the reception thereof by said Board of Directors acting through the officers of said Association, and all matters relating thereto.

3. That the said Special Master shall direct and supervise the special election by shareholders and members of said Long Beach Federal Savings and Loan Association, and all matters relating thereto.

4. That said Special Master shall supervise the proceedings for, and rule upon the adequacy of, the accounting to be made by said conservator pursuant to said order, and all matters relating thereto.

5. That said Special Master shall act as referee between the parties litigant, or any of them, in resolving any controversies which may arise in connection with any of the subject matters of said order and rule thereon.

6. That said Special Master shall at all times have access to the premises of the said Association and its books and records, and shall regulate and control the inspection of the assets, books and records of said Long Beach Federal Savings and Loan Association in connection with said order of the Court.

7. That said Special Master shall have the power to issue such orders and conduct such meetings, hearings and proceedings as are necessary or appropriate in connection with the said order of the Court.

8. That said Special Master, in addition to the

powers [4710] herein specified, shall have all of the general powers conferred upon a Special Master under Rule 53 of the Federal Rules of Civil Procedure.

9. That said Special Master shall prepare a report or reports upon all matters herein submitted to him at the conclusion of the proceedings, and from time to time as may be necessary, or as the Court may require.

10. That said Special Master shall have full authority to incur necessary expenses for facilities in connection with said special mastership and to employ and pay all necessary personnel, including, without limiting, stenographers, accountants, shorthand reports, agents and representatives to assist him in the orderly execution and performance of his duties. All such personnel are hereby declared to be casual labor. The Special Master shall, from time to time, file with the clerk an itemization of expenses and liabilities incurred by him, including salaries and fees, and the clerk shall make payments to said Special Master out of the funds of the Long Beach Federal Savings and Loan Association on deposit in the Registry of the Court, in accordance with said itemization.

11. That the compensation of said Special Master shall be fixed by the Court at the conclusion of his services as Special Master and from time to time upon petitions for interim allowances duly presented. All allowances to said Special Master for necessary expenses for facilities, salaries of per-

sonnel or otherwise, and for fees, shall be paid from the funds of the Long Beach Federal Savings and Loan Association now on deposit in the Registry of the Court, or from such other assets of said Long Beach Federal Savings and Loan Association as the Court may direct.

Dated at Los Angeles, Calif., this 23rd day of January, 1948.

/s/ PEIRSON M. HALL,
Judge. [4711]

The undersigned hereby consent to and approve the foregoing Order:

WESTOVER & SMITH,
By /s/ WYCKOFF WESTOVER,
Attorneys for the Plaintiffs-
Petitioners.

/s/ CHARLES K. CHAPMAN,
Attorney for L. B. Federal
Savings & Loan Assn.

THOMAS & WALLACE,
By /s/ H. O. WALLACE,
Attys. for Def. and Cross-
Claimant, Title Service Co.

/s/ JAMES M. CARTER,
U. S. Attorney.

/s/ WILLIAM F. McKENNA,
For Home Loan Bank Board.

O'MELVENY & MYERS,

By /s/ JOHN WHYTE,

Attys. for Third-Party Defendant and Cross-Claimant Federal Home Loan Bank of Los Angeles.

/s/ RAYMOND TREMAINE,

Attorney for Defendant and Cross-Claimant, Robert H. Wallis.

[Endorsed]: Filed January 23, 1948. [4712]

[Title of District Court and Cause.]

ITEMIZATION OF LIABILITY INCURRED FOR WAGES BY SPECIAL MASTER

Ronald Walker, Special Master in the above-entitled action, presents herewith his interim itemization of liability for wages incurred by him and respectfully shows:

1. That pursuant to the order of reference herein, it has been necessary for said Special Master, in the execution and performance of his duties, to employ personnel as casual labor as set forth in the attached Itemization of Liability.

2. That attached hereto is an Itemization of Liability incurred by such Special Master for wages for said employees between the dates 8:30 a.m. Thursday, June 1, 1950, and 5:00 p.m. Friday, June 30, 1950.

3. That said order of reference provides that

upon the filing of an Itemization of Liability for wages incurred, the Clerk shall make payments to said Special Master of such amount out of the funds of the Long Beach Federal Savings and Loan Association on deposit in the Registry of the [19999] Court.

Wherefore, petitioner prays that said Itemization of Liability for Wages Incurred be approved by this Honorable Court and that the Clerk of this Court be instructed to pay the said sum of \$480.42 to said Special Master out of the funds of the Long Beach Federal Savings and Loan Association on deposit in the Registry of the Court.

/s/ RONALD WALKER,
Special Master. [20000]

The foregoing Itemization of Liability incurred for wages by said Special Master for the period between June 1, 1950, and June 30, 1950, is hereby approved and the Clerk of this Court is instructed to pay to said Special Master the said sum of \$480.42 from the funds of the Long Beach Federal Savings and Loan Association on deposit in the Registry of the Court.

Dated: This 17th day of July, 1950.

/s/ PEIRSON M. HALL,
Judge.

I hereby consent to and approve the foregoing order.

Dated: July 8th, 1950.

/s/ CHARLES K. CHAPMAN,
Attorney for Long Beach
FS&LA. [20001]

Name	No. Hrs.	Rate	Total
Minnie Eyrieh			
6/ 1 - 6/15.....	45½	1.25	\$ 56.92
6/16 - 6/30.....	22½	1.25	27.50
Margaret Darneal			
6/ 1 - 6/30.....	104	1.50	156.00
Mack M. Racklin (Court Reporter)			
per statement 7/1/50.....			240.00
			<hr/> \$480.42

I hereby certify that the foregoing is a true and correct itemization of liability incurred by me as Special Master in the above-entitled action for wages of personnel employed by me for the period beginning June 1, 1950, and ending June 30, 1950.

/s/ RONALD WALKER,
Special Master.

[Endorsed]: Filed July 11, 1950. [20002]

At a stated term, to wit: The February Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 24th day of July, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Peirson M. Hall,
District Judge.

[Title of Cause.]

MINUTE ORDER

For hearing on (1) report of progress of parties herein made in re negotiations for settlement; (2) report of Ronald Walker, Special Master, as to how inspection of San Francisco Bank is progressing, pursuant to order therefor granted Dec. 8, 1948; (3) motion to approve further report of Special Master on discovery proceedings, filed Feb. 27, 1950, and continued from March 6, 1950; (4) order to show cause directed to the Federal Home Loan Bank of San Francisco, sometimes known as FHLB of Portland, and to the Federal Home Loan Bank of Los Angeles, and to all of the 300 financial institutions, the purported Directors and Officers thereof, and the former Directors and Officers of said purported San Francisco Bank, why the relief prayed for in the motion of this moving party for an order for the dissolution of the San Francisco Bank should not be granted pursuant to notice and order

therefor signed and filed July 6, 1948; (5) motion of defendant and cross-defendant Federal Home Loan Bank of San Francisco, and the cross-defendants Wm. A. Davis and Gerritt Vander Ende, sued in this action individually, and as a Director and/or Officer of the Federal Home Loan Bank of San Francisco, for a summary judgment in favor of said cross-defendants and against the cross-defendant Long Beach Federal Savings & Loan Assoc., pursuant to notice July 30, 1948; and (6) motion of defendants C. N. Boynton, et al., cross-defendants, for a summary judgment, pursuant to notice filed July 30, 1948; [20010]

Wyckoff Westover, Esq., appearing as counsel for plaintiffs and Shareholders' Protective Committee; Paul Fitting, Ass't U. S. Atty., appearing as counsel for Federal Home Loan Bank Board, John H. Fahey, and A. V. Ammann; and Ronald Walker, Special Master, being present;

Filed third Interim Report of Special Master on discovery proceedings.

On the Court's own motion it is ordered that all hearings are continued to Oct. 2, 1950, 10 a.m.

On the Court's own motion it is ordered that hearing on motion of plaintiffs in Case No. 5678-PH Civil, and third-party defendants and cross-claimants in Case No. 5421-PH Civil, Federal Home Loan Bank of Los Angeles, et al., for summary judgment, set for Aug. 14, 1950, is continued to Oct. 2, 1950, 10 a.m. [20011]

[Title of District Court and Cause.]

THIRD INTERIM REPORT OF SPECIAL MASTER ON DISCOVERY PROCEEDINGS

To The Honorable United States District Court:

Ronald Walker, Special Master, presents herewith his Third Interim Report on the discovery proceedings instituted pursuant to Rule 34 FRCP, and respectfully shows:

1. That subsequent to the report of the Special Master on the Type, Nature and Character of Files Maintained by the Federal Home Loan Bank of San Francisco, filed November 29, 1948, following the preliminary proceedings to determine the manner and mode to be pursued in the discovery proceedings, further discovery was deferred because of the pendency of [20012] settlement negotiations, until January 19, 1950.

2. On January 19, 1950, formal discovery proceedings were recommenced at the office of the Federal Home Loan Bank of San Francisco at their Los Angeles Branch. Hearings have continued intermittently subsequent to that date and 39 hearings have been held as follows: January 19, 20, 23, 24, 27; February 14, 15, 17, 21, 23; March 7, 8, 9, 20; April 4, 5; May 2, 3, 4, 9, 10, 11, 16, 17, 18; June 1, 2, 7, 8, 15, 16, 20, 21, 22, 27, 28, 29; July 5 and 6. Lapses in continuity of the proceedings have occurred from time to time due to the necessity of counsel being absent because of other proceedings in the instant case, their absence from the city due to

further settlement discussions in Washington, D. C., during the week of July 17th-24th, illness and trial engagements in other cases. The Special Master has attempted to push the discovery proceedings as rapidly as possible, but occasional continuances have been necessary for the above reasons.

3. Participating in the discovery proceedings have been the following counsel: Charles K. Chapman Esq., for Long Beach Federal Savings and Loan Association; O'Melveny & Myers, for the Los Angeles Bank Group; W. I. Gilbert Jr., Esq., for First Federal Savings and Loan Association of Wilmington; Wyckoff Westover, Esq., for Shareholders Protective Committee; Irving G. Bishop, Esq., for San Francisco Bank; Paul Fitting, Esq., for the Official Defendants. Others participating have been: Granville Smith, Accountant for Long Beach Federal Savings and Loan Association and T. A. Gregory, President of plaintiff association.

4. The proceedings have, from time to time, involved much acrimonious dispute among counsel. Several witnesses have been sworn and testified as to many matters involved in the discovery proceedings. In most instances the Special Master has been able to reconcile the differences between [20013] counsel. Many rulings have been necessary as to the availability of documents for inspection or reproduction and in all such cases photostats have been made, sealed and will later be presented to the court for ruling.

5. Some delay has been occasioned by the necessity of having files and documents forwarded to the hearings from the San Francisco and Portland offices of the Federal Home Loan Bank of San Francisco. This has precipitated several acrimonious arguments, but in the view of the Special Master the co-operation of the Federal Home Loan Bank of San Francisco has been excellent and several thousand pounds of records and documents have been forwarded here for inspection.

6. It has been necessary for the Special Master to employ a court reporter and daily transcripts have been prepared which now number 39.

7. The microfilming process has been utilized since the beginning of the discovery proceedings for two purposes. First, this has been done for the protection of the San Francisco Bank, its officers and employees, since many original records and documents are sent out to be photostated and, secondly, to permit counsel to examine the contents of the various documents and files with a view box in their own offices and away from the formal discovery proceedings. A microfilm operator has been employed by the Special Master for this work. As the inspection progresses more and more use has been made of the microfilm process and 37 rolls of film which include several hundreds of pictures each, have been made and developed. As to the supervisory files the Special Master, in an attempt to expedite the discovery proceedings, will propose to counsel that the supervisory files, as produced, be microfilmed in

their entirety and that counsel working from the microfilm submit to the Special Master written lists of those documents which they will wish photostated. This should result [20014] in eliminating many hearing days with a resulting saving in cost to the parties litigant.

8. There have presently been submitted to the Special Master and marked for identification 538 exhibits. Each of these exhibits contain from 1 to 1000, or more, documents, each of which it has been necessary to mark and identify by number.

9. Photostating costs in the sum of \$4,090.42 have presently been expended or incurred by the parties litigant, in connection with photostating ordered through the discovery proceedings.

10. There are now physically present in Los Angeles, six (6) transfer file drawers containing various bookkeeping records, transfer ledgers, stock records, expense vouchers and receipts, which have been requested and which the Special Master anticipates will be made available to counsel and accountants at the next hearing.

11. Supervisory Files. Mr. A. C. Newell, who was appointed by the Home Loan Bank Board to remove from the supervisory files, matters which should not be inspected because of the public interest involved, has been engaged for several weeks on such work. This has involved a review of several thousands of files of associations in California, Arizona, Nevada, and Hawaii, which makes up approxi-

mately two-thirds in number of the member savings and loan associations in the 11th District, as presently constituted. The Special Master is advised that the number of these files which will be produced for inspection will approximate 1000 files and in bulk, 14 file drawers.

12. No work has been done as yet upon the supervisory files of member associations in the territory comprising Oregon, Washington, Idaho, Utah, Montana and Alaska. [20015]

13. It is difficult, if not impossible, to suggest a date at which the discovery proceedings can be concluded, as it cannot be known to the Special Master what files and records will be requested as the hearings progress. If it is necessary to inspect all of the supervisory files, which are now located in Los Angeles, it is evident that the proceedings cannot be concluded before late fall. If it is necessary to inspect the supervisory files of the associations in the northern area much more time will be consumed. All possible efforts will be given to concluding the matter as soon as possible and with the co-operation of all parties and the increased use of the microfilming process, it may be that they can be completed sooner than is now contemplated.

Dated: July 24, 1950.

/s/ RONALD WALKER,
Special Master.

[Endorsed]: Filed July 24, 1950. [20016]

[Title of District Court and Cause.]

ANSWER TO THE COMPLAINT IN INTER-
VENTION OF LILLIAN A. COGGSWELL

Come now the defendants, Home Loan Bank Board, William K. Divers, Chairman; J. Alston Adams, Member, and O. K. LaRoque, Member, of the Home Loan Bank Board, the Federal Savings and Loan Insurance Corporation, a [20052] corporate instrumentality of the United States wholly owned by the United States, and John H. Fahey, and for their defense to the Complaint in Intervention in the above-entitled actions of Plaintiff in Intervention, Lillian A. Coggsowell, state:

First Defense

I.

The Home Loan Bank Board is an agency of the United States and the United States has not authorized or consented to suit against it. The Home Loan Bank Board and the United States are indispensable parties to the above-entitled actions.

II.

The said Board is an unincorporated body and is not a suable entity.

III.

The official residence of said Board is in the District of Columbia and for the purposes of these actions and said Complaint in Intervention said Board is an inhabitant of the District of Columbia.

No service of process has been had upon said Board within the State of California of the said Complaint in Intervention or at all in these actions.

IV.

The official residences of William K. Divers, Chairman; J. Alston Adams, Member, and O. K. LaRoque, Member of the Home Loan Bank Board, are in the District of Columbia and for the purposes of these actions and said Complaint in Intervention they are inhabitants of the District of Columbia. The residence of John H. Fahey is in the State of Massachusetts, and for the purposes of these actions and said Complaint in Intervention he is an inhabitant of said State. No one of these defendants is a resident or inhabitant of the State of California. The only attempted service of process on any of these defendants was in the District of Columbia. Service of process was not had upon any of said defendants in the State of California. The Court has not acquired jurisdiction over them and neither these actions nor this Complaint in Intervention can be maintained against them in the State of California. These defendants deny that they are subject to the jurisdiction of this Court. [20053]

V.

The principal office of the Federal Savings and Loan Insurance Corporation is in the District of Columbia, it maintains no office in the State of California, and there is no officer or agent in California upon whom service of process has been or

can be made. The only purported service of process on the Federal Savings and Loan Insurance Corporation has been in the District of Columbia. The Federal Savings and Loan Insurance Corporation has not been properly served with process.

VI.

Neither the above-entitled actions nor any part of them is an action to enforce any lien upon or claim to, or to remove any encumbrance or lien or cloud upon the title to, real or personal property within the District, nor do they involve any action in interpleader or in the nature of interpleader upon which an order for substituted service may legally be based.

VII.

William K. Divers, Chairman; J. Alston Adams, Member, and O. K. LaRoque, Member, of the Home Loan Bank Board, and John H. Fahey, and each of them are indispensable parties to these actions and this Court has no jurisdiction over them or any of them.

Second Defense

I.

These defendants and each of them incorporate by this reference and make a part hereof all the defenses and statements in the answers of the Home Loan Bank Board, William K. Divers, Chairman; J. Alston Adams, Member, and O. K. LaRoque, Member, of the Home Loan Bank Board, and John H. Fahey, and each or any of them, to the plaintiff's First Amended and Supplemental Complaint,

to the Amended Cross-claim and Supplemental Cross-claim of defendant Long Beach Federal Savings and Loan Association, to the Third Party Cross-claim of the Federal Home Loan Bank of Los Angeles, to the Cross-claim of the Title Service Company, and to the Cross-claim and all Supplemental Cross-claims in Interpleader of the Title Service Company. [20054]

II.

These defendants deny the allegations of paragraph I of the said Complaint in Intervention.

III.

These defendants have no information upon which to base a belief as to the truth of the allegations of paragraphs II, III, IV, and V of the said Complaint in Intervention.

IV.

In answer to paragraph VI of the said Complaint in Intervention these defendants state that A. V. Ammann was the Conservator for the Long Beach Federal Savings and Loan Association from May 20, 1946, to January 24, 1948, and during all such period exercised his functions as said Conservator except October 1 and 2, 1946; that these defendants have no information upon which to state a belief as to the conditions imposed by the Title Service Company on the performance of any duties the said Title Service Company may owe to the Plaintiff in Intervention; that said Title Service Company is owned, controlled and dominated by the

person or persons who control and dominate the Long Beach Federal Savings and Loan Association and is his or their alter ego; that these defendants have no information upon which to form a belief as to the descriptions of or references to the note and deed or whether said note and deed is referred to in orders of the Court; and that these defendants on information and belief deny every other allegation of said paragraph.

V.

These defendants deny the allegations of paragraphs VII, VIII, and IX.

VI.

As to paragraphs X and XI, these defendants deny that this Court has any jurisdiction over any of these actions or proceedings, and state that this Court has no power to grant any of the relief prayed for by the Plaintiff in Intervention. These defendants have no information upon which to form a belief as to the Plaintiff in Intervention's danger of being barred by the running of the statute of limitations on said note and deed of trust or other risk or danger faced by said Plaintiff in Intervention. [20055]

VII.

Except as specifically admitted herein, these defendants deny each and every allegation of said Complaint in Intervention.

Third Defense

The said Complaint in Intervention of Lillian A. Coggsell fails to state a claim upon which relief can be granted.

Fourth Defense

These defendants and each of them deny that he or it has or ever has had or asserted any claim or right to any fund in this Court, or to any property in any way involved in this litigation located in the State of California, or any claim or interest to any property held, owned, or claimed by the Long Beach Federal Savings and Loan Association, or to the note and deed of trust or either of them described in the said Complaint in Intervention.

* * *

Wherefore, these defendants pray that the return of service of process upon the defendants, Home Loan Bank Board; William K. Divers, Chairman; J. Alston Adams, Member; O. K. LaRoque, Member of the Home Loan Bank Board; the Federal Savings and Loan Insurance Corporation; and John H. Fahey and each of them be quashed, that the Complaint in Intervention of Intervenor Lillian A. Coggsell be dismissed, that the defendants recover their cost and disbursements therein and for such other and further relief as may be proper in the premises.

Dated this 3rd day of August, 1950.

ERNEST A. TOLIN,
United States Attorney.

PAUL FITTING,
Assistant U. S. Attorney,

By /s/ PAUL FITTING,

Assistant United States Attorney, Attorneys for defendants, Home Loan Bank Board; William K. Divers, Chairman; J. Alston Adams, Member; and O. K. LaRoque, Member of the Home Loan Bank Board; John H. Fahey; and the Federal Savings and Loan Insurance Corporation.

[Endorsed]: Filed August 3, 1950. [20056]

[Title of District Court and Cause.]

ANSWER OF A. V. AMMANN AND GEORGE
K. BRAMLEY TO THE COMPLAINT IN
INTERVENTION OF LILLIAN A. COGGS-
WELL

Come now the defendants, A. V. Ammann and George K. Bramley, and file this their Answer to the Complaint in Intervention in the above-entitled actions, of Plaintiff in Intervention, Lillian A. Coggsowell, and state: [20057]

First Defense

I.

The said Complaint in Intervention fails to state a claim upon which relief can be granted.

Second Defense

I.

The Home Loan Bank Board is an agency of the United States and the United States has not authorized or consented to suit against it. The Home Loan Bank Board and the United States are indispensable parties to the above-entitled actions.

II.

The said Board is an unincorporated body and is not a suable entity.

III.

The official residence of said Board is in the District of Columbia and for the purposes of these actions and said Complaint in Intervention said Board is an inhabitant of the District of Columbia. No service of process has been had upon said Board within the State of California of the said Complaint in Intervention or at all in these actions.

IV.

The official residences of William K. Divers, Chairman; J. Alston Adams, Member; and O. K. LaRoque, Member, of the Home Loan Bank Board; are in the District of Columbia and for the purposes of these actions and said Complaint in Intervention they are inhabitants of the District of Columbia. The residence of John H. Fahey is in the State of Massachusetts, and for the purposes of these actions and said Complaint in Intervention he is an inhabitant of said State. No one of these defendants is a resident or inhabitant of the State

of California. The only attempted service of process on any of these defendants was in the District of Columbia. Service of process was not had upon any of said defendants in the State of California. The Court has not acquired jurisdiction over them and neither these actions nor this Complaint in Intervention can be maintained against them in the State of California. [20058]

V.

Neither the above-entitled actions nor any part of them is an action to enforce any lien upon or claim to, or to remove any encumbrance or lien or cloud upon the title to, real or personal property within the District, nor do they involve any action in interpleader or in the nature of interpleader upon which an order for substituted service may legally be based.

VI.

William K. Divers, Chairman; J. Alston Adams, Member; and O. K. LaRoque, Member, of the Home Loan Bank Board; and John H. Fahey, and each of them are indispensable parties to these actions and this Court has no jurisdiction over them or any of them.

Third Defense

I.

These defendants incorporate herein as if the same were part hereof all the denials and statements in the Separate Answer of A. V. Ammann to Cross-Claim in Interpleader of Title Service

Company and their answers, or the answers of either of them, to the plaintiff's First Amended and Supplemental Complaint, to the Amended Cross-Claim and Supplemental Cross-Claim of Defendant Long Beach Federal Savings and Loan Association, to the Third Party Cross-Claim of the Federal Home Loan Bank of Los Angeles, and to all supplemental cross-claims in interpleader of the Title Service Company, all in the above-entitled actions.

II.

These defendants deny the allegations of paragraph I of said Complaint in Intervention.

III.

In answer to paragraph II of said Complaint in Intervention, these defendants state that from May 20, 1946, to January 24, 1948, except October 1 and 2, 1946, defendant A. V. Ammann was the duly appointed and acting Conservator for the Long Beach Federal Savings and Loan Association; that these defendants are informed and believe and therefore state the facts to be, with respect to the said note and deed of trust held by Plaintiff in Intervention Lillian A. Coggsell, as [20059] follows:

(1) In September, 1946, the said Lillian A. Coggsell advised an employee of the Long Beach Federal Savings and Loan Association at the offices of the said Association that she held a first lien on the property described in said Complaint in Intervention; that upon inquiry by the employee of the Long Beach Federal Savings and Loan Association at that time it was determined that the lien

of the said Lillian A. Coggs well was inferior to the lien of the Association; that later in the same month the said Lillian A. Coggs well came to the offices of said Association and paid off in full the loan held by the Association on said property; that accordingly the Association delivered to the said Lillian A. Coggs well the original deed of trust, the original deed of trust note perforated with "Paid" stamp and executed request for reconveyance, and a fire insurance policy of the Merchants' and Manufacturers' Insurance Company; that the said Lillian A. Coggs well acknowledged receipt of these documents on a copy of a letter addressed to her by the Association; that the records of the Association indicate that before the appointment of the conservator the Association had requested the trustee to institute foreclosure proceedings; that on or about October 8, 1946, the attorney for the said Lillian A. Coggs well wrote to the Long Beach Federal Savings and Loan Association that it had been the intention of the said Lillian A. Coggs well to take an assignment of the note and deed of trust rather than to repay the said loan; that on or about October 10, 1946, the said attorney for the said Lillian A. Coggs well returned the documents given on or about September 27, 1946, to the said Lillian A. Coggs well and requested that the Association give the said Lillian A. Coggs well an assignment of these documents in order that she might proceed to collect the balance of the money due on the said loan or foreclose the deed of trust if that became necessary; and that in accordance

with this request the Association assigned the loan to the said Lillian A. Coggs well without recourse to it. [20060]

(2) That the books and records of the Long Beach Federal Savings and Loan Association accurately reflect the aforesaid transaction, and that the said books and records, and all documents received by the Association during the period of the conservatorship properly retainable by it were delivered pursuant to the order of this Court to the custody of those persons designated by the Court on or about January 24, 1948, and are incorporated in and are a part of the Accounting of the defendant A. V. Ammann furnished pursuant to the order of this Court.

And that as to the other allegations of said paragraph II these defendants have no information on which to form a belief.

IV.

In answer to paragraphs III, IV, and V of said Complaint in Intervention, these defendants state the facts to be as herein elsewhere set forth, and these defendants have no knowledge upon which to form a belief as to the truth of the other allegations of said paragraphs III, IV, and V.

V.

In answer to paragraph VI of the said Complaint in Intervention these defendants state that A. V. Ammann was the Conservator for the Long Beach Federal Savings and Loan Association from

May 20, 1946, to January 24, 1948, and during all such period exercised his functions as said Conservator except October 1 and 2, 1946; that these defendants have no information upon which to state a belief as to the conditions imposed by the Title Service Company on the performance of any duties the said Title Service Company may owe to the Plaintiff in Intervention; that said Title Service Company is owned, controlled and dominated by the person or persons who control and dominate the Long Beach Federal Savings and Loan Association and is his or their alter ego; that these defendants have no information upon which to form a belief as to the descriptions of or references to the note and deed or whether said note and deed is referred to in orders of the Court; that the facts are as herein elsewhere set forth; and that these defendants on information and belief deny every other allegation of said paragraph VI. [20061]

VI.

These defendants deny the allegations of paragraphs VII, VIII, and IX.

VII.

As to paragraphs X and XI, these defendants deny that this Court has any jurisdiction over any of these actions or proceedings, and state that this Court has no power to grant any of the relief prayed for by the Plaintiff in Intervention. These defendants have no information upon which to form a belief as to the Plaintiff in Intervention's danger of being barred by the running of the statute of

limitations on said note and deed of trust or other risk or danger faced by said Plaintiff in Intervention.

VIII.

Except as specifically admitted herein, these defendants deny each and every allegation of said Complaint in Intervention.

Fourth Defense

I.

These defendants state that they or either of them does not have and never has had or asserted any claim adverse or contrary to the Long Beach Federal Savings and Loan Association. These defendants state that during the time he was such Conservator the said A. V. Ammann performed the functions and duties of the office of said Conservator but that since January 24, 1948, he has never been or claimed to be Conservator nor claimed, asserted or exercised any right or power in connection with any asset or property of the Long Beach Federal Savings and Loan Association. Neither of these defendants has any claim of any nature to the note and deed of trust described in said Complaint in Intervention.

* * *

Wherefore, these defendants pray that the said Complaint in Intervention be dismissed, that these defendants recover their costs and disbursements herein and for such other and further relief as may be proper in the premises.

Dated August 3, 1950.

ERNEST A. TOLIN,
United States Attorney,

By /s/ PAUL FITTING,
Assistant United States Attorney, Attorneys for
Defendants A. V. Ammann and George K.
Bramley. [20062]

District of Columbia,
City of Washington.

A. V. Ammann, being first duly sworn, deposes
and says:

That he is the defendant A. V. Ammann in the
consolidated actions in the United States District
Court for the Southern District of California,
known as Mallonee, et al., v. Fahey, et al., and Fed-
eral Home Loan Bank of Los Angeles, et al., v.
Federal Home Loan Bank of Portland, et al., Civil
Actions 5421-PH and 5678-PH; that he has read
the foregoing Answer and knows the contents
thereof and that the same is true to his own knowl-
edge, except as to those matters which are therein
stated on information and belief, and as to those
matters he believes them to be true.

/s/ A. V. AMMANN.

Subscribed and sworn to before me this 27th day
of July, 1950.

[Seal] /s/ PAUL PFEIFFER, JR.,
Notary Public.

My commission expires October 15, 1952.

[Endorsed]: Filed August 3, 1950. [20063]

[Title of District Court and Cause.]

ITEMIZATION OF LIABILITY INCURRED
FOR WAGES BY SPECIAL MASTER

Ronald Walker, Special Master in the above-entitled action, presents herewith his interim itemization of liability for wages incurred by him and respectfully shows:

1. That pursuant to order of reference herein, it has been necessary for said Special Master, in the execution and performance of his duties, to employ personnel as casual labor as set forth in the attached Itemization of Liability.

2. That attached hereto is an Itemization of Liability incurred by such Special Master for wages for said employees between the dates 8:30 a.m., Monday, July 3, 1950, and 5:00 p.m., Monday, July 31, 1950.

3. That said order of reference provides that upon the filing of an Itemization of Liability for wages incurred, the Clerk shall make payments to said Special Master of such amount out of the funds of the Long Beach Federal Savings and Loan Association on deposit in the Registry of the Court. [20069]

Wherefore, petitioner prays that said Itemization of Liability for Wages Incurred be approved by this Honorable Court and that the Clerk of this Court be instructed to pay the said sum of \$138.25 to said Special Master out of the funds of the Long

Beach Federal Savings and Loan Association on deposit in the Registry of the Court.

/s/ RONALD WALKER,
Special Master. [20070]

The foregoing Itemization of Liability incurred for wages by said Special Master for the period between July 3, 1950, and July 31, 1950, is hereby approved and the Clerk of this Court is instructed to pay to said Special Master the said sum of \$138.25 from the funds of the Long Beach Federal Savings and Loan Association on deposit in the Registry of the Court.

Dated: This 11th day of August, 1950.

/s/ PEIRSON M. HALL,
Judge.

I hereby consent to and approve the foregoing order.

Dated: August 9th, 1950.

/s/ CHARLES K. CHAPMAN,
Attorney for Long Beach
FS&LA. [20071]

Name	No. Hrs.	Rate	Total
Minnie Eyrich			
7/ 3 - 7/15.....	15	1.25	\$ 18.75
7/16 - 7/31.....	18	.....	22.50
Margaret Darneal			
7/ 3 - 7/31.....	38	1.50	57.00
Mack M. Racklin (Court Reporter)			
per statement 7/28/50.....			40.00
			<hr/> \$138.25

I hereby certify that the foregoing is a true and correct itemization of liability incurred by me as Special Master in the above-entitled action for wages of personnel employed by me for the period beginning July 3, 1950, and ending July 31, 1950.

/s/ RONALD WALKER,
Special Master.

[Endorsed]: Filed August 11, 1950. [20072]

[Title of District Court and Cause.]

AFFIDAVIT OF PAUL FITTING

United States District Court,
Southern District of California—ss.

Paul Fitting, being duly sworn, says:

That he is Assistant United States Attorney for the Southern District of California, and has had general supervision of the preparation of a supplemental or a complete new accounting to be filed by A. V. Ammann;

That in preparing such supplemental or new accounting he has endeavored to meet and consult with all counsel concerned, and with their [20073] accountants, in order that all possible views as to the scope of the new or supplemental accounting might be obtained, and all possible objections anticipated or satisfied where possible and where such could be done consistently with the position of the official defendants in this litigation;

That in the past ninety days there have been numerous conferences between the parties to the litigation looking towards the reconciling of the differences of the parties concerning the scope of the supplemental or new accounting, and that most, but not all, of those differences have been eliminated;

That continuous and joint attention of all counsel involved to the accounting problems has not always been possible because of other more pressing aspects of the case, such as the regular discovery proceedings, the Coggsweil intervention, the fee order hearing, and the preparation of the three appeals now pending, all of which have taken most of counsels' time devoted to this litigation;

That a squad of accountants from the Federal Bureau of Investigation, under the supervision of Special Agent Murray B. Myerson, is presently at work in the office of the Long Beach Federal Savings and Loan Association going through the papers relating to all of the approximately five thousand loans in existence during the conservatorship for the purpose of preparing detailed seventy-one item schedules on each such loan;

That said work is the first, but largest, item to be covered in the supplemental or new accounting;

That the amount of supplemental and additional work to be done in connection with the accounting is substantial and will require time well beyond August 22, 1950; that an extension of at least ninety days is necessary, and that at the end of such ninety days counsel and the Court will be in a better posi-

tion to judge when the accounting can be concluded.

/s/ PAUL FITTING.

Subscribed and sworn to before me this 18th day of Aug., 1950.

EDMUND L. SMITH,
Clerk, United States District Court, Southern District of California.

By /s/ THEODORE HOCKE,
Deputy Clerk.

[Endorsed]: Filed August 21, 1950. [20074]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR
FILING ACCOUNTING

It appearing that the time for defendant A. V. Ammann to file either a supplemental accounting or a completely new accounting will expire on August 22, 1950; and

After considering the affidavit of Paul Fitting, Assistant United States Attorney, and good cause therefor appearing; [20075]

It Is Hereby Ordered that the time within which defendant A. V. Ammann shall file either a supplemental accounting or a completely new accounting, as he may in his judgment deem necessary, is hereby extended to and including November 22, 1950.

Dated: August 18, 1950.

/s/ RONALD WALKER,
Special Master.

[Endorsed]: Filed August 21, 1950. [20076]

[Title of District Court and Cause.]

ITEMIZATION OF LIABILITY INCURRED
FOR WAGES BY SPECIAL MASTER

Ronald Walker, Special Master in the above-entitled action, presents herewith his interim itemization of liability for wages incurred by him and respectfully shows:

1. That pursuant to order of reference herein, it has been necessary for said Special Master, in the execution and performance of his duties, to employ personnel as casual labor as set forth in the attached Itemization of Liability.

2. That attached hereto is an Itemization of Liability incurred by such Special Master for wages for said employees between the dates 8:30 a.m. Tuesday, August 1, 1950, and 5:00 p.m. Tuesday, August 29, 1950.

3. That said order of reference provides that upon the filing of an Itemization of Liability for wages incurred, the Clerk shall make payments to said Special Master of such amount out of the funds of the Long Beach Federal Savings and Loan Association on deposit in the Registry of the [20080] Court.

Wherefore, petitioner prays that said Itemization of Liability for Wages Incurred be approved by this Honorable Court and that the Clerk of this Court be instructed to pay the said sum of \$671.89 to said Special Master out of the funds of the Long

Beach Federal Savings and Loan Association on deposit in the Registry of this Court.

/s/ RONALD WALKER,
Special Master. [20081]

The foregoing Itemization of Liability incurred for wages by said Special Master for the period between August 1, 1950, and August 29, 1950, is hereby approved and the Clerk of this Court is instructed to pay to said Special Master the said sum of \$671.89 from the funds of the Long Beach Federal Savings and Loan Association on deposit in the Registry of the Court.

Dated this 31st day of August, 1950.

/s/ DAVE W. LING,
District Judge.

I hereby consent to and approve the foregoing order.

Dated: August 30th, 1950.

[Seal] /s/ CHARLES K. CHAPMAN,
Attorney for Long Beach
FS&LA. [20082]

Name	No. Hrs.	Rate	Total
Minnie Eyrieh			
8/ 1 - 8/15.....	22½	1.25	\$ 28.18
8/16 - 8/29.....	37½	1.25	47.03
Mary Miles			
8/16 - 8/29.....	63	1.25	72.75
M. Johnson			
8/16 - 8/29.....	35½	1.25	43.93
Margaret Darneal			
8/ 1 - 8/29.....	120	1.50	180.00
			<hr/> \$371.89
Mack M. Racklin, Court Reporter (per statement)			
(15 days @ \$20.00 per day).....			300.00
			<hr/> \$671.89

I hereby certify that the foregoing is a true and correct itemization of liability incurred by me as Special Master in the above-entitled action for wages of personnel employed by me for the period beginning August 1, 1950, and ending August 29, 1950.

/s/ RONALD WALKER,
Special Master.

[Marginal note]: Received check \$671.89.

/s/ RONALD WALKER.

[Endorsed]: Filed August 31, 1950. [20083]

[Title of District Court and Cause.]

ITEMIZATION OF LIABILITY INCURRED FOR WAGES BY SPECIAL MASTER

Ronald Walker, Special Master in the above-entitled action, presents herewith his interim itemization of liability for wages incurred by him and respectfully shows:

1. That pursuant to order of reference herein, it has been necessary for said Special Master, in the execution and performance of his duties, to employ personnel as casual labor as set forth in the attached Itemization of Liability.

2. That attached hereto is an Itemization of Liability incurred by such Special Master for wages for said employees between the dates 8:30 a.m. Fri-

day, September 1, 1950, and 5:00 p.m. Friday, September 29, 1950.

3. That said order of reference provides that upon the filing of an Itemization of Liability for wages incurred, the Clerk shall make payments to said Special Master of such amount out of the funds of the Long Beach Federal Savings and Loan Association on deposit in the Registry of the [20157] Court.

Wherefore, petitioner prays that said Itemization of Liability for Wages Incurred be approved by this Honorable Court and that the Clerk of this Court be instructed to pay the said sum of \$416.43 to said Special Master out of the funds of the Long Beach Federal Savings and Loan Association on deposit in the Registry of this Court.

/s/ RONALD WALKER,
Special Master. [20158]

The foregoing Itemization of Liability incurred for wages by said Special Master for the period between September 1, 1950, and September 29, 1950, is hereby approved and the Clerk of this Court is instructed to pay to said Special Master the said sum of \$416.43 from the funds of the Long Beach Federal Savings and Loan Association on deposit in the Registry of the Court.

Dated: This 3rd day of October, 1950.

/s/ PEIRSON M. HALL,
District Judge.

I hereby consent to and approve the foregoing order.

Dated: September 30th, 1950.

/s/ CHARLES K. CHAPMAN,
Attorney for Long Beach
FS&LA. [20159]

Name	No. Hrs.	Rate	Total
Mary Mild			
9/1 - 9/29.....	67½	1.25	\$ 84.43
Margaret Darneal			
9/1 - 9/29.....	88	1.50	132.00
Mack M. Racklin, Court Reporter (per statement)			
(covers period 9/12 thru 9/28 only).....			200.00
			<hr/> \$416.43

I hereby certify that the foregoing is a true and correct itemization of liability incurred by me as Special Master in the above-entitled action for wages of personnel employed by me for the period beginning September 1, 1950, and ending September 29, 1950.

/s/ RONALD WALKER,
Special Master.

[Endorsed]: Filed October 2, 1950. [20160]

At a stated term, to wit: The September Term., A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Central on Monday, the 2nd day of October, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Peirson M. Hall,
District Judge.

[Title of Cause.]

MINUTE ORDER

For hearing on (1) report of the parties herein made in re negotiations for settlement; (2) report of Ronald Walker, Special Master, as to how inspection of San Francisco Bank is progressing, pursuant to order therefor dated Dec. 8, 1948; (3) order to show cause directed to Fed. Home Loan Bank of San Francisco and to Fed. Home Loan Bank of Los Angeles, and to all of the three hundred financial institutions, the purported directors and officers thereof, and the former directors and officers of said San Francisco Bank, why the relief prayed for in the motion of this moving party for an order for the dissolution of the San Francisco Bank should not be granted, pursuant to notice and order therefor signed and filed July 6, 1948; (4) motion of defendant and cross-defendant Federal Home Loan Bank of San Francisco and the cross-defendants Wm. A. Davis and Gerritt Vander

Ende, sued in this action individually, and as a director and/or officer of the Federal Home Loan Bank of San Francisco, for a summary judgment in favor of said cross-defendants, and against the cross-defendant Long Beach Federal Savings & Loan Assoc., pursuant to notice of July 30, 1948; (5) motion of defendants C. N. Boynton, et al., cross-defendants, for a summary judgment, pursuant to notice filed July 30, 1948; (6) motion of plaintiffs for summary judgment on complaint and cross-claim of Federal Home Loan Bank of Los Angeles pursuant to notice of June 27, 1950; and (7) motion of Home Loan Bank Board, et al., for summary judgment, pursuant to notice of Aug. 31, 1950; [20155]

W. I. Gilbert, Jr., Esq., appearing as counsel for First Federal Savings & Loan Assoc., of Wilmington, Calif.; B. W. Priest, Esq., appearing as counsel for Federal Home Loan Bank of Los Angeles; Arline Martin, Ass't U. S. Att'y, appearing as counsel for Federal Home Loan Bank Board, John H. Fahey, and A. V. Ammann; Thos. F. Menzies, Esq., appearing as counsel for Robert H. Wallace;

Court orders cause continued to Dec. 4, 1950, 10 a.m., for said hearings. [20156]

At a stated term, to wit: The September Term A. D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 5th day of October, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Peirson M. Hall,
District Judge.

[Title of Cause.]

EX PARTE ORDER

Upon oral request of Ronald Walker, Special Master, for instructions, it is hereby ordered of the Court's own motion that the orders of reference heretofore made, if they contain anything to the contrary, are hereby modified so as to permit inspection and copying by the Special Sub-committee of the Committee on Expenditures in the Executive Departments of the House of Representatives, which sub-committee was created on or about Aug. 15, 1950, or any authorized counsel, investigator, employee or member thereof, of any and all records, files, documents, instruments or data which are the subject of the pending discovery proceedings in the above-entitled consolidated case.

[Endorsed]: Filed October 5, 1950. [20166]

At a stated term, to wit: The September Term A. D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 5th day of October, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Peirson M. Hall,
District Judge.

[Title of Cause.]

EX PARTE ORDER

The Court entered the following ex parte order.

On the Court's own motion, the Special Master is hereby ordered to make an interim report on the progress and status of the accounting heretofore ordered to be made by certain defendants in connection with the order and judgment for the turnover of the Long Beach Federal Savings & Loan Association. Such interim report shall be made on or before Oct. 23, 1950, and copies thereof served on counsel for Long Beach Savings & Loan Association, Federal Home Loan Bank of Los Angeles, et al., Federal Home Loan Bank of San Francisco, Plaintiffs Mallonee, et al., Wilmington Federal Savings & Loan Association, Title Service Co., Robert H. Wallace, and the United States Attorney for the Southern District of California.

[Endorsed]: Filed October 5, 1950. [20167]

[Title of District Court and Cause.]

REPORT ON PROGRESS OF THE
ACCOUNTING OF A. V. AMMANN

Comes Now, Ronald Walker, Special Master, in the above-entitled case and pursuant to order of court made October 5, 1950, files herewith his report upon the progress of the accounting of the Defendant, A. V. Ammann of his conservatorship of the Long Beach Federal Savings and Loan Association and respectfully shows:

1. On February 21, 1950, a hearing was held before the Special Master to consider the preliminary exceptions filed on behalf of the Long Beach Association and the Shareholders Protective Committee to the accounting of the Defendant A. V. Ammann as conservator. In the course of said hearing it was [20172] represented by attorneys for the Government and for the official defendants that accountants for the Federal Bureau of Investigation would undertake the preparation of a new or supplementary account on behalf of the Defendant A. V. Ammann.

At the conclusion of said hearing the Defendant A. V. Ammann was granted an additional period of 90 days or until May 22, 1950, within which to file such supplementary accounting (see transcript P. 34). Thereafter, and on March 7, 1950, a formal order to that effect was signed and filed. A copy of such order is attached hereto for the convenience of the Court and marked Exhibit "A."

2. Thereafter by interim orders the time for filing such accounting has been extended to November 22, 1950.

3. Subsequent to March 7, 1950, numerous conferences were held between counsel at which the attendance of the Special Master was required in an effort to agree upon forms and to determine the exact information to be reported in connection with the item of \$952,725.51 interest on mortgage loans. Such meetings were held on March 10, May 9, June 5 and June 15, 1950. Numerous detailed forms were submitted by each of the parties in an effort to agree upon the type of report to be submitted. The commencement of actual work at the association was deferred and delayed because of disagreement among counsel as to the information to be supplied. Substantial agreement was finally reached, but agreement on all points was never reached.

4. On August 15, 1950, a meeting was held at the Long Beach Association, attended by the Special Master; Charles K. Chapman, Esq., attorney for Long Beach Association; T. A. Gregory, President of the Long Beach Association; Mr. Smith, accountant for the Long Beach Association; Wyckoff Westover, Esq., attorney for the Shareholders Protective Committee; Paul Fitting, Esq., Assistant United States Attorney; Murray Myerson, Special Agent [20173] of the Federal Bureau of Investigation, and two other special agents of the Federal Bureau of Investigation. At this meeting methods of procedure were discussed and determined and

arrangements made for Federal Bureau of Investigation accountants to have access to the necessary information from the files and records maintained at the Long Beach Association.

5. Subsequent to August 15, 1950, one or more accountants for the Federal Bureau of Investigation have worked intermittently upon said accounting. The exact number of days or man-hours expended are unknown to the Special Master, except by the reports made by counsel for the Long Beach Association and for the Government, and herein-after referred to.

6. Upon the entry of the ex parte order of October 5, 1950, requiring the Special Master to report on the progress of the accounting, the Special Master required a report upon such progress to be given him by Government counsel and counsel for the Long Beach Association.

7. A copy of the report rendered by the Long Beach Association is attached hereto marked Exhibit "B."

8. A copy of the report rendered by Government counsel is attached hereto marked Exhibit "C."

9. Reference is made to page 6 of Exhibit "B" wherein it is estimated in such report that subsequent to August 15, 1950, 250 man-hours have been expended upon work on the accounting or an average of 28 man-hours per week for one accountant. In the opinion of the Special Master this is an insufficient showing to report said progress on said

accounting. It has been reported to the Special Master that the volume of work necessary, to accumulate all of the detailed reports in making the supplementary accounting, is such as to require the full-time efforts of three or four accountants over a period of eight months to a year.

10. It is quite evident further and additional extensions [20174] of time will be necessary for the completion of said accounting and if a prompt and adequate accounting is to be filed it is essential that more accountants will have to be assigned to this work.

Dated: October 18, 1950.

/s/ RONALD WALKER,
Special Master. [20175]

EXHIBIT A

In the United States District Court in and for the
Southern District of California, Central Division

Civil Action No. 5421-PH

(and consolidated, related and enjoined actions)

MALLONEE, et al.,

Plaintiffs,

vs.

FAHEY, et al.,

Defendants.

ORDER RE SUPPLEMENTAL ACCOUNTING

The Court on February 10, 1950, having ordered that the hearings before the Special Master on the accounting of A. V. Ammann be resumed on February 21, 1950, and:

Said hearings having commenced on Tuesday, February 21, 1950, at 10:00 a.m. before the undersigned Special Master in Hearing Room No. 810 in the United States Court House and Post Office Building, 312 North Spring Street, Los Angeles, California, and Mr. Charles K. Chapman, Mr. Wyckoff Westover, Mr. Irving G. Bishop and Mr. Paul Fitting having appeared on behalf of their clients, as heretofore appears of record, and the Special Master having heard the arguments and statements of said persons present:

Now Therefore, It Is Hereby Ordered that the defendant A. V. Ammann shall have until May 22, 1950, to file either a supplemental accounting or a

completely new accounting, as he may [20176] in his judgment deem necessary, and;

It Is Further Ordered that in making and filing such supplemental, or completely new, accounting, said Ammann shall take into consideration the preliminary objections filed in the above cause on December 15, 1949, by plaintiffs Mallonee, et al., and third-party plaintiff and cross-claimant Long Beach Federal Savings and Loan Association, and shall attempt within his discretion and where possible, to supply the factual detail requested in such preliminary objections; and

It Is Further Ordered that hearing on the above preliminary objections heretofore filed is placed off calendar until further order.

This order is without prejudice to the right of the plaintiffs Mallonee, et al., and third-party plaintiff and cross-claimant Long Beach Federal Savings and Loan Association to file further or new exceptions to such supplementary or new accounting.

Dated: March 7, 1950.

RONALD WALKER,
Special Master. [20177]

EXHIBIT B

In the District Court of the United States in and for
the Southern District of California, Central
Division

Civil Action No. 5421-P.H.

MALLONEE, et al.,

Plaintiffs,

vs.

FAHEY, et al.,

Defendants.

(Consolidated with)

Civil Action No. 5678—P.H.

FEDERAL HOME LOAN BANK OF LOS AN-
GELES, et al.,

Plaintiffs,

vs.

FEDERAL HOME LOAN BANK OF SAN
FRANCISCO, Also Sometimes Known as Fed-
eral Home Loan Bank of Portland, et al.,
Defendants.

REPORT OF LONG BEACH FEDERAL SAV-
INGS AND LOAN ASSOCIATION TO HON-
ORABLE RONALD WALKER, SPECIAL
MASTER, RE: PROGRESS BY DEFEND-
ANTS IN PREPARATION OF THEIR
AMENDED AND SUPPLEMENTAL AC-
COUNTING

Comes Now Long Beach Federal Savings and
Loan Association, third-party plaintiff and cross-
claimant, and pursuant to request of the Honorable

Ronald Walker, Special Master, for a report on progress of defendants Ammann, et al., in the preparation of said defendants Supplementary and Amended accounting, respectfully shows to said Court and to said Special Master, as follows:

1. That on October 5th, 1950, the Honorable Court, of its own motion, made its Order that the Special Master should, on the 23rd of October, 1950, “. . . make an interim report on the progress and status of the accounting heretofore ordered to be made by certain defendants in connection with the order and judgment for the turnover of the Long Beach Federal Savings & Loan Association . . .” That said Special Master thereafter requested of counsel representing defendants Ammann, et al., and counsel representing Long Beach Federal Savings and Loan Association, a report as to the progress made by defendants Ammann, et al., in their supplements and amendments to their said accounting.

2. Said Long Beach Association was not among the defendants ordered to render such accounting, but was one of the parties to whom said accounting was to be rendered by defendants Ammann, et al.

3. Said Association has been trying, by negotiations, by Court proceedings, by objections to previous accountings filed and by all other means within its power, to obtain from defendants Ammann, et al., a true, correct and detailed accounting, itemized sufficiently so as to present an intelligible statement and narrative of what defendant Ammann

claims to have done with said Association's assets, aggregating approximately \$26,000,000.00, during the more than 20 months such assets, seized by Ammann, et al., were under the possession, dominion and control of said defendants Ammann, et al.

4. That the said accounting filed by defendants Ammann, et al., was completely lacking in many of the essentials of an accounting and was merely in the nature of an audit or examination, without flow, stopping point, starting point, narrative, itemization or detail. [20179]

5. That such omissions and lacks in said accounting, were deliberate and intentional and not the result of any oversight. That after said Association and its Shareholders Protective Committee had objected to said accounting, defendants Ammann, et al., notwithstanding such objections, failed and refused to in any way supplement or add to said accounting, or otherwise to expand or enlarge the same. That when said Honorable Court, upon hearings on the objections to said accounting, announced said Court's oral opinion that said accounting was insufficient, improper and inadequate, said defendants, Ammann, et al., yet persisted in standing upon their said incomplete and inadequate purported accounting as filed by them, and yet continued to refuse to furnish any additional information or detail whatsoever. That only after said Court orally announced its intention to make an order requiring defendant Ammann to return to California and testify and give evidence in support of, in corrobora-

tion of the said purported accounting, did counsel for defendants Ammann, et al., announce their willingness to supplement, amend and add to, the said incomplete, inadequate purported accounting and to furnish the details, information and statements omitted and lacking from said original purported accounting.

6. That only when confronted with the Court's announced ruling that their presently filed accounting, upon which they had stood, was inadequate and unacceptable, did defendants Ammann, et al., offer supplementary information. That even then, they only offered to furnish such information as was demanded by the objectors. That of the information required by the objectors, accounting defendants Ammann, et al., have, since the inception of the accounting proceedings, refused and still continue to refuse, to furnish the following information:

A. Titles:

(1) The title condition of the loans which he seized from the Association, whether clear or clouded;

(2) The title condition of the loans which he returned to the Association, including new loans made by defendant Ammann, as well as those he seized from the Association and returned to it, whether clear or clouded;

(3) The priority of the deeds of trust or other security for the [20180] loans seized, whether first

deeds of trust, second deeds of trust, or other junior liens or encumbrances;

(4) The priority of the deeds of trusts, or other security for the loans returned to the Association, including new loans made by defendant Ammann, as well as those he seized, whether first deeds of trust, second deeds of trust, or other junior liens or encumbrances.

B. The extent and effect of modification of terms of payment of seized \$12,000,000.00 of notes and deeds of trust.

As originally filed Ammann's accounting did not disclose which of the loans he had modified by cutting interest rates, reducing monthly payments, and postponing dates of maturity. The supplementary information which he has agreed to furnish does not include, and Ammann yet refuses to state the total results, in dollars of:

(1) His reduction of interest rates, cutting of monthly payments, and extending of maturity dates on seized loans;

(2) His refinancing of such loans, for lower interest rates, and for longer maturities.

Such information in the viewpoint of the Association, and those objecting to Ammann's accounting, is prerequisite and essential to any full and complete accounting, notwithstanding which, accounting defendants Ammann, et al., have refused and still refused to furnish such information.

7. The Association, through its counsel, notified counsel for those accounting, that such withheld information rendered the proposed amended and supplemental accounting incomplete and subject to further objections, notwithstanding which, the accounting defendants have continued to prepare supplementary information regarding the loan portfolio, deeds of trust, interest collected, reduction of interest rates, monthly payments, and postponement of maturity dates. That of the 84 objections to Ammann's purported accounting, filed by the Association and its Shareholders Protective Committee, but a minor part have been the subject of such conferences. All other matters of such objections remain for future consideration.

9. There have been a series of conferences between counsel for the [20181] Association, the Shareholders Protective Committee, the Association's auditor, and the accounting defendants' counsel and auditors. There has also been considerable correspondence on this subject of proposed forms for the supplemental information concerning said loan portfolio and its approximately \$12,000,000.00 of notes and deeds of trust. Such correspondence culminated on the part of said Association, in letters:

(1) Letter of August 1st, 1950, from counsel for said Association to counsel for the accounting defendants, marked Exhibit "A," and attached hereto;

(2) Letter of August 1st, 1950, from counsel for the Shareholders Protective Committee to counsel

for accounting defendants, marked Exhibit "B," and attached hereto.

On August 3rd, 1950, accounting defendants Ammann, et al., through counsel, wrote declining to furnish requested information, except they were willing to state the date to which interest was paid on the loans seized by defendants Ammann, et al., on May 20th, 1946;

On August 15th, 1950, counsel and auditors for accounting defendants Ammann, et al., to have access to such records of the Association as they desired during all regular business hours.

Since that time, approximately 250 accountant man hours have been spent by the various accountants for such defendants in working from the Association's records. In the 9 weeks that have thus elapsed, this is an average of 28 hours per week for one auditor. On a rough estimate, if the work continues at the present pace, it is estimated that approximately 1 year will elapse before completion of this portion of the supplement to the accounting.

While this is a major portion of the supplementary work, it is not all of such work, and it is likewise estimated that considerable additional time will be required on other phases of the objections to the accounting, dealing with conservator's charges and expenses, transactions in the bond portfolio, and many other important matters.

If the Court should rule that the information as to: [20182]

(1) Titles of the properties securing the loans, whether clear or clouded;

(2) The priority of the deeds of trust, whether first, seconds, or other junior encumbrances;

(3) The total dollar extent of Ammann's (et al.) reduction of interest rates, cutting of monthly payments, and extensions of maturity dates;

is information which accounting defendants will be required to furnish, it is probable that most of the one year of work must be partially at least, redone. A ruling by the Court as to the requirement or necessity of furnishing such information would be helpful to the progress of defendants' accounting.

Dated this 16th day of October, 1950.

Respectfully submitted,

CHARLES K. CHAPMAN,
Attorney for Third-Party Plaintiff and Cross-
Claimant Long Beach Federal Savings and
Loan Association. [20183]

Exhibit A

August 1, 1950

Hon. Ernest A. Tolin,
United States Attorney at Los Angeles,
Federal Building,
Los Angeles 12, California.

In re: Mallonee, et al., vs. Fahey, et al., Civil
Action No. 5421-P.H. (and consolidated, related, and enjoined actions
No. 5678-P.H., in said Southern District,
No. 7989-W.M. in said Southern District,
No. 28203-G in the Northern District and
No. 14492 in the Superior Court of California)
Ammann's proposed amended and Supplementary
accounting.

Attention: Mr. Paul Fitting
Assistant United States Attorney

Dear Sir:

We have conferred on several occasions concerning the form of your supplement to the item of \$952,725.51 interest on mortgage loans filed with the court without substantiation, itemization, interest rate, or detail of any matter whatsoever.

As the result of the court's ruling and our numerous conferences, you have at our insistence, indicated that you will in your supplement to your accounting disclose the interest rates, the amounts you collected, the dates upon which you reduced the interest rates and monthly payments, but you have refused, despite our repeated requests, to include in your accounting the following information:

1. Title condition of the loan, (that is, whether it is a first or second or other junior lien, and whether or not the borrower had title to the property when you made the loan upon it).

2. The date to which the interest was paid on the loans seized by you on May 20, 1946.

3. The amount of interest required to be collected by the terms of the note:

- (a) Until refinanced by you,
- (b) Until modified by you,
- (c) Until assigned by you, [20184]
- (d) Until delivered to court by you,
- (e) After refinancing to January 24, 1948,
- (f) After modified to January 24, 1948,
- (g) After assigning to January 24, 1948.

4. The amount of interest required by the terms of the note after you reduced the interest rates:

(a) From date of reduction to January 24, 1948,

(b) From January 24, 1948, to the date to which you extended maturity,

(c) The amount of the interest called for by the original note from date of seizure by you to the date to which you extended its maturity.

We consider your refusal to furnish this information is a refusal to state to the court, the association and the shareholders, information essential to determine the amounts of money involved in your changing the terms of payment and rates of interest of the notes seized by you. A cut of interest

rates from $6\frac{1}{2}\%$ to 4% on a \$10,000.00 loan, if effective for only two months and involving a total of only \$40.00 or \$50.00 loss of interest, is a very different from an identical cut in rate of interest over a period of fifteen to twenty years, which thereby involves a loss of \$2,000.00 or \$3,000.00 in interest collectable. Yet your accounting requires the shareholders to undertake this computation because you refuse to state what you did to the loan.

This is to notify you that despite the fact that our accountant, pursuant to the order of the court, will be present when you are working on the association's books, that we do not acquiesce in, accept, or assent to your omitting from your accounting what we consider information essential to an accurate and true accounting and to the protection of the association, its shareholders, depositors and others doing business with it.

We will, at the earliest possible moment, expect to take every recourse before the court and whatever other authority may be available to us to compel a proper and truthful accounting. [20185]

We regret the necessity of writing this letter but repeated claims of estoppel and acquiescence throughout the conduct of this litigation, seem to necessitate this letter, in order to preserve the rights of those we are seeking to protect.

Yours truly,

.....

Charles K. Chapman, Attorney for Long Beach Federal Savings and Loan Association. [20186]

Exhibit B

August 1, 1950

United States Attorney
Southern District of California
600 Federal Building
Los Angeles 12, California

Atten.: Mr. Paul Fitting,
Assistant U. S. Attorney

Re: Mallonee vs. Fahey
Civil #5421-P.H.
Inadequate Accounting of
A. V. Ammann, et al.

Dear Mr. Fitting:

In reply to your letter of July 25, 1950, please be advised that we do not agree with the attitude of the Attorney General in insisting that the Defendant, A. V. Ammann, should render an incomplete, inadequate accounting, on the basis of the form submitted to us by you with your letter of June 13, 1950.

It is our position that the information called for by the form of June 13, 1950, is inadequate, incomplete and will not produce an accounting in compliance with the Order of the U. S. District Court of January 23, 1948, requiring that the Defendant, A. V. Ammann, render a full and complete accounting. The June 13, 1950, form proposed by your office will allow the Defendant, A. V. Ammann, to continue to conceal from the U. S. District Court and the Plaintiff, Shareholder Members of the Long Beach Federal Savings and Loan Association, the

changes, and the effect thereof, which the Defendant, A. V. Ammann, made in the character and value of the notes and trust deeds converted by him and the other Defendants.

We, of course, also protest the needless, wasteful expenditure of monies for again making an incomplete, and inadequate accounting. [20187]

Nevertheless, if the Attorney General and your office insist on proceeding on this improper basis, we will, of course, give you whatever assistance and cooperation we are able to, in order to mitigate the damages being done by this wasteful expenditure of money.

I understand the Mr. Charles K. Chapman, counsel for the Association, is in direct contact with you in arranging a mutually satisfactory date for your accountants to start work on this form of incomplete and inadequate accounting.

Yours truly,

WESTOVER & SMITH,

By

Attorneys for Plaintiffs.

CC to Hon. Ronald Walker
Special Master

WW:dk [20188]

EXHIBIT C

In the United States District Court in and for the
Southern District of California, Central Division

Civil Action No. 5421-PH

(and consolidated, related and enjoined actions.)

MALLONEE, et al.,

Plaintiffs,

vs.

FAHEY, et al.,

Defendants.

FEDERAL HOME LOAN BANK OF LOS AN-
GELES, et al.,

Plaintiffs,

vs.

FEDERAL HOME LOAN BANK OF SAN
FRANCISCO, Also Sometimes Known and Re-
ferred to as the Federal Home Loan Bank of
Portland, et al.,

Defendants.

REPORT TO SPECIAL MASTER RE
PROGRESS OF ACCOUNTING

On February 21, 1950, the Court made its order that an accounting be prepared, and following that order, considerable time and effort was expended in all parties arriving at an agreement as to the form, and the matter to be included therein, covering all loans in existence at any time during the conservatorship. A form agreeable to both sides was finally achieved as of July 24, 1950, after negotiations outlined in detail below. The actual work of

transferring information to the form agreed upon was begun on or about August 15, and we are informed that as of October 3, 1950, information had been placed on approximately 1000 [20189] of the forms mentioned. It would appear then, that the preliminary foundation has been laid for the actual work of the accounting, that from this time on it should proceed without interruption.

The course of the negotiations regarding the form upon which the information is to be compiled was as follows:

At the hearing before the Special Master on February 21, 1950, it was agreed that the F.B.I. accountants should start work at Long Beach at once, but that on the first day, all counsel should be present. The earliest date that this could be accomplished was March 10, and on that day, all counsel and two F.B.I. accountants made a preliminary inspection of the files, and the accountants spent the following week at work on the files. By March 15, an impasse was reached between the F.B.I. accountants and the Long Beach accountant over the information to be furnished and the form that it was to take, so that a conference between counsel was necessary.

Because of other duties of counsel, the earliest the conference could be held was April 4th, at which time, the counsel for Long Beach submitted a detailed proposed form.

On April 7, the Government submitted their revision of this form.

No new conference could be arranged with at-

torneys for the plaintiff until May 9, when a further discussion was had between counsel over the form. The proposed revisions were submitted to Washington, and on May 16, counsel for the plaintiffs were informed of the Government's position on the form.

No new conference between the parties could be arranged until June 5 when there was a further discussion of revisions and further communication with Washington. On June 12, the Department's position was indicated to counsel for the plaintiff, and a further conference held on June 15, at which time plaintiffs agreed to submit further data and forms. [20190]

The new forms and data were submitted on July 6, and at once transmitted to Washington. On July 25, the Department's position was again communicated to counsel for plaintiffs, reiterating the Government's position and stating that the Government was again ready to start the accounting at any time. On August 15, the accountants began work at Long Beach.

Respectfully submitted,

ERNEST A. TOLIN,

United States Attorney.

CLYDE C. DOWNING,

Assistant U. S. Attorney,
Chief of Civil Division.

ARLINE MARTIN,

Assistant U. S. Attorney,
Attorneys for Defendants.

State of California,
County of Los Angeles—ss.

Margaret Darneal, being first duly sworn deposes and says that she is a citizen of the United States and a resident of Los Angeles County, California; that 458 South Spring Street, Los Angeles, California; that she is over the age of 21 years, and is not a party to the above-entitled action; that on October 18, 1950, she deposited in the United States Mails a true and correct copy of the within Report on Progress of the Accounting of A. V. Ammann, addressed to the attorneys of record in said action at the office address of said attorneys as follows: Charles K. Chapman, Esq., Ocean Center Bldg., Long Beach, Calif.; Wyckoff Westover, Esq., 215 West 6th Street, Los Angeles, Calif.; O'Melveny & Myers, Esqs., 433 S. Spring St., Los Angeles, Calif.; Bishop & Hoffman, Esqs., 215 West 5th Street, Los Angeles, Calif.; W. I. Gilbert, Jr., Esq., 458 S. Spring Street, Los Angeles, Calif.; Ernest A. Tolin, U. S. Attorney, Federal Bldg., Los Angeles, Calif.; Raymond Tremaine, Esq., 210 West 7th St., Los Angeles, Calif.; Lyman B. Sutter, Jergins Trust Bldg., Long Beach, California, and then by sealing said envelope and depositing the same, with postage fully prepaid thereon in the city where is located the office of the attorney by whom service was made; that there is a regular delivery service by United States mail at the place so addressed and/or there is a regular communication by mail between the place of mailing and the place so addressed.

/s/ MARGARET DARNEAL.

Subscribed and sworn to before me this 19th day of October, 1950.

[Seal] /s/ STANLEY A. PHIPPS,
Notary Public in and for
Said County and State.

[Endorsed]: Filed October 23, 1950. [20192]

At a stated term, to wit: The September Term A. D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Wednesday the 25th day of October in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Peirson M. Hall,
District Judge.

[Title of Cause.]

MINUTE ORDER

For hearing on report of Ronald Walker, Special Master, on progress of accounting, filed Oct. 23, 1950; Wyckoff Westover, Esq., appearing as counsel for plaintiffs and Shareholders Protective Committee; Ronald Walker, Special Master, present; Chas. K. Chapman, Esq., appearing as counsel for defendant Long Beach Fed. Sav. & Loan Assoc.; Raymond Tremaine, Esq., appearing as counsel for

defendant Robert H. Wallis; E. A. Tolin, U. S. Att'y, and Paul Fitting, Ass't U. S. Att'y, appearing as counsel for defendant Fed. Home Loan Bank Board, John H. Fahey, and A. V. Ammann;

Murray B. Myerson is called, sworn, and testifies.

Ex. 10-25-50-1, 10-25-50-2, and 10-25-50-3 by Chapman are marked for ident.

Court orders cause continued to Nov. 1, 1950, 10 a.m., for further hearing. [20193]

Old Loan: Trustor.....	Assumed by:
New Loan: Trustor.....	Assumed by:

Trust Deed Recorded:	Date	Book	Page
Old Trust Deed .....	.....	.....	.....
New Trust Deed .....	.....	.....	.....
Address of Property			

Authorization to:	Modify	Assign	Refinance
Number .....	.....	.....	.....
Date .....	.....	.....	.....

				Type of Loan
1. Original Loan	Insured.....	%	By Whom.....	
2. Refinancing Loan	Insured.....	%.....	By Whom.....	

Loan documents returned to Association 1-24-48.....

If not, location of loan documents 1-24-48.....

Status at May 20, 1946:			Interest Collec
Principal Due	\$.....		At Regular
Original Amount of Loan	\$.....		At Modified
Monthly payment	\$.....		At Refinanc
Interest Rate			Total
Date of Loan			
Approximate Maturity			
Date Interest Paid To			Principal Coll

Modification Data:			While in Or
Prin. Due at Modification	\$.....		While Modi
New Monthly Payment	\$.....		While Refin
			Total
Date of Modification			
New Interest Rate			Assignment D
New Approximate Maturity			Principal A

Refinancing Data:			Date of Ass
Amount of Refinanced Loan	\$.....		Date of Ret
Old Bal. When Refinanced	\$.....		
New Monthly Payment	\$.....		Intervention I
			Date of Inte
Date of Refinancing Loan			Prin. & Inte
New Loan Number			Paid Into
New Interest Rate			
New Approximate Maturity			Status at Janu

Additional Loans:			Balance of l
Amount	\$.....		or
			Final Pav-

New Loan No.

Old Loan No.

Old Loan: Trustor

Assumed by:

New Loan: Trustor

Assumed by:

Trust Deed Recorded:	Date	Book	Page	County	Lot No.	Block No.	Tract No.
Old Trust Deed	.....	.....	.....	.....	.....	.....	.....
New Trust Deed	.....	.....	.....	.....	.....	.....	.....
Address of Property	.....	.....	.....	.....	.....	.....	.....

Authorization to:	Modify	Assign	Refinance	Remarks
Number	.....	.....	.....	.....
Date	.....	.....	.....	.....

	Type of Loan			
1. Original Loan	Insured	%	By Whom	Title Condition
2. Refinancing Loan	Insured	%	By Whom	Title Condition
Loan documents returned to Association 1-24-48				
If not, location of loan documents 1-24-48				

Status at May 20, 1946:		Interest Collected:	
Principal Due	\$	At Regular Rate	\$
Original Amount of Loan	\$	At Modified Rate	\$
Monthly payment	\$	At Refinanced Rate	\$
Interest Rate	.....	Total	\$
Date of Loan	.....	
Approximate Maturity	.....	
Date Interest Paid To	.....	

Modification Data:		Principal Collection:	
Prin. Due at Modification	\$	While in Original State	\$
New Monthly Payment	\$	While Modified	\$
		While Refinanced	\$
		Total	\$

Date of Modification	.....	Assignment Data:
New Interest Rate	.....	Principal Amount When Assigned
New Approximate Maturity	.....	\$ .....

Refinancing Data:		Date of Assignment	
Amount of Refinanced Loan	\$	Date of Return	.....
Old Bal. When Refinanced	\$		
New Monthly Payment	\$		

Date of Refinancing Loan	.....	Intervention Data (Money Paid Into Court):
New Loan Number	.....	Date of Intervention
New Interest Rate	.....	Prin. & Interest Collected &
New Approximate Maturity	.....	Paid Into Court
		\$

Additional Loans:		Status at January 24, 1948:	
Amount	\$	Balance of Principal Due	\$
		or	
		Final Pay-off Date	.....

Date of Advance	.....	Interest After Modification on Modified
		Principal Balance at Old Rate:
		To 1-24-48
		From 1-24-48 to Modified Mat'y
		\$

Interest at Original Rate on Original Loan:		Interest After Modification on Modified	
Until Refinanced	\$	Principal Balance at Modified Rate:	
Until Modified	\$	To 1-24-48	
Until Assigned	\$	From 1-24-48 to Modified Mat'y	
Until Del'd to Court	\$	\$	
After Ref'cing to 1-24-48	\$		
After Modifying to 1-24-48	\$		
After Assigning to 1-24-48	\$		



EXHIBIT 10-25-50-3

PF:dfi

5421-PH

August 3, 1950

Charles K. Chapman, Esq.,
Ocean Center Building,
Long Beach 2, Calif.

Re: Mallonee vs. Fahey, Civil #5421-PH

Dear Mr. Chapman:

We have your letter of August 1, 1950, relating to the Ammann accounting, and we have forwarded copies thereof to the Department at Washington. As we informed you at our conference on August 1, 1950, the F.B.I. accountants are ready to start work at the Association at any time. We understand that you will inform us of the date that is convenient to you.

In your letter of August 1, 1950, you state that we have refused to include in the accounting "2. The date to which the interest was paid on the loans seized by you on May 20, 1946." It is our position that a true accounting does not require computation by us of future interest due or statements of conclusions as to title status. However, we are willing and will include in the form the above quoted Item 2.

Very truly yours,

ERNEST A. TOLIN,

United States Attorney.

cc: Wyckoff Westover, Esq.

Ronald Walker, Esq. [20196]

[Title of District Court and Cause.]

NOTICE OF HEARING

To Long Beach Federal Savings and Loan Association, and Charles K. Chapman, Esq., its attorney.

To the Plaintiffs herein, and Westover & Smith, Esqs., their attorneys.

To Federal Home Loan Bank of San Francisco, and Bishop & Hoffmann, Verne Dusenbery and Philip H. Angell, Esqs., its attorney.

To Federal Home Loan Bank of Los Angeles, and O'Melveny & Myers and Richard Fitzpatrick, Esqs., its attorneys.

To the Defendants Fahey, et al., and Ernest A. Tolin, U. S. Attorney, their attorney. [20197]

To First Federal Savings and Loan Association of Wilmington, and W. I. Gilbert, Jr., Esq., its attorney.

To Title Service Company, and Lyman B. Sutter, Esq., its attorney.

To Robert Wallis, and Raymond Tremaine, Esq., his attorney.

You and Each of You will please take notice that on the 6th day of November, 1950, at the hour of 10 o'clock a.m., or as soon thereafter as counsel may be heard in the courtroom of the Honorable Peirson M. Hall, District Judge, Ronald Walker, Special Master in the above-entitled action, will present to

the Court for approval his Interim Report and Petition for Partial Interim Allowance upon his Fees herein.

Dated: This 25th day of October, 1950.

/s/ RONALD WALKER,
Special Master.

[Endorsed]: Filed October 26, 1950. [20198]

[Title of District Court and Cause.]

INTERIM REPORT OF SPECIAL MASTER
ON PROGRESS OF DISCOVERY AND
ACCOUNTING AND PETITION FOR
FURTHER PARTIAL INTERIM ALLOW-
ANCE ON FEES

I.

All previous interim reports by the Special Master either upon the accounting herein required, upon the progress of the discovery proceedings, or upon other phases of the above-entitled consolidated actions are included herein by reference as though fully set forth herein. [20199]

II.

Discovery Proceedings

Formal hearings upon the discovery proceedings subsequent to the preliminary examination as to the nature, type and character of the records and files maintained by the Federal Home Loan Bank of San

Francisco commenced on January 19, 1950, at the Los Angeles office of the Federal Home Loan Bank of San Francisco. As of the date of the filing of this report and petition there have been 70 days of formal hearings and it is anticipated that two or more days of hearings will be completed prior to the hearing of this report and petition. All of such hearings were transcribed by a court reporter employed by the Special Master and the official transcripts containing 2214 pages thereof will be presented to the court when this petition is heard.

III.

Inspection of the records and files is practically completed with the exception of the supervisory files which will be discussed in a subsequent paragraph. Files as requested have been forwarded to Los Angeles from the Portland and San Francisco offices of the San Francisco Bank, so that the work might proceed here and avoid travel expense. However, it may be necessary to hold hearings in San Francisco and Portland if the parties seeking discovery indicate their desire to inspect files remaining at the San Francisco and Portland offices.

IV.

Files, minute books, ledgers and other material has been marked for identification as produced, particularly where reproduction has been desired. To date 1031 exhibit numbers have been assigned, each containing from 10 to 1500 documents each, of which it has been necessary to stamp and identify by dash numbers. [20200]

56 Reels of micro-film have been taken and developed in duplicate, of material desired to be reproduced by micro-film.

Phostats have been required by various parties to the proceeding and \$4,949.15 has been expended for photostating.

V.

Supervisory Files

Mr. A. C. Newell, who was appointed by the Home Loan Bank Board to remove from the supervisory files, matters which should not be inspected because of the public interest involved, was engaged for several weeks on such work. This has involved a review of several thousands of files of associations in California, Arizona, Nevada and Hawaii, which makes up approximately two-thirds in number of the member savings and loan associations in the 11th District, as presently constituted. The Special Master is advised that the number of these files which will be produced for inspection will approximate 1000 files and in bulk, 14 file drawers.

No work has been done as yet upon the supervisory files of member associations in the territory comprising Oregon, Washington, Idaho, Utah, Montana and Alaska.

VI.

Participating in the discovery proceedings have been the following counsel: Charles K. Chapman, Esq., for Long Beach Federal Savings and Loan Association; O'Melveny & Myers, for the Los Angeles Bank Group; W. I. Gilbert, Jr., Esq., for

First Federal Savings and Loan Association of Wilmington; Wyckoff Westover, Esq. for Shareholders Protective Committee; Irving G. Bishop, Esq., and Alan Thody, Esq., for San Francisco Bank; Paul Fitting, Esq., for the Official Defendants. Others participating have been: Granville Smith, accountant for Long Beach Federal Savings and Loan Association; T. A. Gregory, President of plaintiff association, and employees of Charles K. Chapman, Esq. [20201]

Not all counsel have been present at all hearings. At all of said hearings one or more counsel for the San Francisco Bank have been in attendance, but at some hearings only an accountant from the Long Beach Association, or readers from the office of Mr. Chapman who were engaged in an analysis of material on hand have been present. At each of said hearings, however, the presence of the Special Master was required.

VII.

Accounting

On October 23, 1950, an interim report by the Special Master on the accounting was filed. This matter was, on October 23, 1950, set by the court for hearing on October 25, 1950, at which time the matter was heard for one-half day and continued until November 1, 1950, so that as of the date of this report the matter has not been [20202] concluded.

Petition for Partial Interim Allowance of Fees
to Special Master

I.

The last partial, interim allowance of fees to the Special Master was March 9, 1950, at which time an allowance of \$15,000 was granted. An appeal was taken by the Government and the Federal Home Loan Bank of San Francisco from such order, which appeal has not yet been determined.

The services required from said Special Master have been such as to require most of his time and to prevent him from accepting other substantial work. It is necessary for said Special Master to petition from time to time for an allowance upon fees to enable him to be able to continue with this work.

II.

The only services for which an allowance of fees is sought herein are those rendered subsequent to March 5, 1950, which is subsequent to the filing of the last petition for an allowance. These services include, among other things the following:

a) Presiding at formal hearings in connection with the discovery proceedings upon the following days:

3/ 7/50	6/ 1/50	8/ 3/50	9/19/50
3/ 8/50	6/ 2/50	8/ 4/50	9/20/50
3/ 9/50	6/ 7/50	8/ 8/50	9/21/50
3/20/50	6/ 8/50	8/ 9/50	9/26/50
4/ 4/50	6/15/50	8/10/50	9/27/50

4/ 5/50	6/16/50	8/16/50	9/28/50
5/ 2/50	6/20/50	8/17/50	9/29/50
5/ 3/50	6/21/50	8/18/50	10/ 5/50
5/ 4/50	6/22/50	8/22/50	10/ 6/50
5/ 9/50	6/27/50	8/23/50	10/10/50
5/10/50	6/28/50	8/24/50	10/11/50
5/11/50	6/29/50	8/25/50	10/13/50
5/16/50	7/ 5/50	8/29/50	10/17/50
5/17/50	7/ 6/50	9/12/50	10/20/50
5/18/50	8/ 1/50	9/13/50	
	8/ 2/50	9/14/50	

Total—61 days.

b) Work at office, Federal Home Loan Bank of San Francisco (Los Angeles office) and Long Beach Federal Savings and Loan Association with the following schedule:

March 10, 1950—At Long Beach Federal Savings and Loan Association with Messrs. Chapman, Westover, Fitting, Myerson and Hansen (F.B.I. Accountants) in connection with the accounting 1 day

April 4, 1950—Conference with Messrs. Chapman, Westover, and Fitting, Myerson & Hansen re accounting..... 2 hrs.

May 8, 1950—Work at Home Loan Bank in connection with exhibits, micro-filming, etc. 4½ hrs.

May 9, 1950—Conference with Messrs. Chapman, Westover, Fitting and Myerson re accounting..... 2 hrs.

May 12, 1950—Work at Home Loan Bank in connection with exhibits, micro-filming, records, etc.	41½ hrs.
May 22, 1950—Work at Home Loan Bank in connection with exhibits, micro-filming, etc.	2 hrs.
June 5, 1950—In court informal report on discovery and accounting.....	½ day
Conference with Messrs. Chapman, Westover, and Fitting re accounting.....	2 hrs.
June 9, 1950—Office work re discovery....	2 hrs.
June 15, 1950—Conference with Messrs. Chapman, Westover, Fitting, and Smith re accounting (on this day the discovery proceeding was adjourned at 2:30 p.m. to permit this conference so no time charge made.)	
June 19, 1950—In court re settlement of fee orders of O'Melveny & Myers and W. I. Gilbert, Jr.	1 day
June 23, 1950—Work at Home Loan Bank in connection with exhibits, micro-filming, etc.	1 day
July 19, 1950—Preparation of report on Discovery Proceedings.....	½ day
July 24, 1950—In court re hearing on interim report on discovery.....	½ day
Preparation of notices re discovery proceedings	1 hr.
July 25, 1950—Letters to Messrs. Thody, Bishop and Dusenbery.....	1 hr.

August 15, 1950—At Long Beach. Installed Federal Bureau of Investigation accountants at association.....	1 day
August 21, 1950—Work at Home Loan Bank in connection with exhibits, micro-filming, etc.	4½ hrs.
August 31, 1950—At Home Loan Bank with Messrs. Thody and Gilbert.....	2 hrs.
October 3, 1950—Work at Home Loan Bank in connection with exhibits, etc....	5½ hrs.
October 4, 1950—Work at Home Loan Bank in connection with micro-filming, exhibits, etc.	5½ hrs.
October 6, 1950—Work at Home Loan Bank after adjournment of discovery hearing on files with H. I. Fischbach, counsel for sub-committee of House Committee on Expenditures (This day included as a hearing day, so no chargeable time.).....	
October 9, 1950—Work at Home Loan Bank in connection with exhibits, etc....	5½ hrs.
October 16, 1950—Office work re report on accounting	2½ hrs.
October 18, 1950—Office work re report on accounting	½ day
October 19, 1950—At Home Loan Bank with H. I. Fischbach.....	1 day
October 23, 1950—In court on report on accounting	1 hr.

October 24, 1950—At Home Loan Bank re completion of micro-filming and office work on preparation of report and petition for fees (1½ day) 4 hrs.

October 25, 1950—In court re report on accounting and office work on report and petition 8 hrs.

Summary of Time Schedule

Formal hearings on discovery	61 days
In Federal Court	2½ days
At office, Bank and Association, 4½ days plus 59½ hours—computed on basis of 7- hour day—8½ days	13 days
	<hr/>
	76½ days

III.

The above-entitled litigation involves issues of the utmost importance to the parties litigant and to the savings and loan industry throughout the nation.

The amounts involved are tremendous and feelings between the litigants run high. The bitterness of the parties adds to the tremendous responsibility of the Special Master in presiding over the various proceedings referred to him.

The issues are complex and involved and require from [20206] the Special Master a specialized knowledge and familiarity with the case far greater than in the normal referral.

Wherefore, petitioner prays that this report be allowed and approved, and that a further and substantial partial interim allowance be made on fees

herein based upon services rendered subsequent to the last previous petition for fees and that said allowance be made from funds on deposit in the Registry of the Court without assessment against any of the parties litigant at this time and reserving all questions of allocation and assessability of such fees until the conclusion of the litigation.

Dated: October 25, 1950.

Respectfully submitted,

/s/ RONALD WALKER,
Special Master.

Affidavit of Service by Mail attached. [20207]

At a stated term, to wit: The September Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Wednesday the 1st day of November, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Peirson M. Hall,
District Judge.

[Title of Cause.]

MINUTE ORDER

For further hearing on report of Ronald Walker, Special Master, on progress of accounting, filed Oct. 23, 1950; Wyckoff Westover, Esq., appearing

as counsel for plaintiffs and Shareholders Protective Committee; Ronald Walker, Special Master, present; Chas. K. Chapman, Esq., appearing as counsel for defendant Long Beach Fed. Sav. & Loan Assoc.; E. A. Tolin, U. S. Att'y, and Paul Fitting and Arline Martin, Ass't U. S. Att'ys, appearing as counsel for Fed. Home Loan Bank Board, John H. Fahey, and A. V. Ammann;

Murry Myerson is recalled and testifies further.

Gov't agrees to put seven auditors on Ammann accounting to complete it in 90 to 120 days. Certain form is approved with reservations. Attorney Chapman to prepare written order.

Court orders hearing on Special Master's report off calendar. [20210]

[Title of District Court and Cause.]

ITEMIZATION OF LIABILITY INCURRED FOR WAGES BY SPECIAL MASTER

Ronald Walker, Special Master in the above-entitled action, presents herewith his interim itemization of liability for wages incurred by him and respectfully shows:

1. That pursuant to order of reference herein, it has been necessary for said Special Master, in the execution and performance of his duties, to employ personnel as casual labor as set forth in the attached Itemization of Liability.

2. That attached hereto is an Itemization of

Liability incurred by such Special Master for wages for said employees between the dates 8:30 a.m., Friday, September 29, 1950, and 5:00 p.m., Monday, October 30, 1950.

3. That said order of reference provides that upon the filing of an Itemization of Liability for wages incurred, the Clerk shall make payments to said Special Master of such amount out of the funds of the Long Beach Federal Savings and Loan Association on deposit in the Registry of the Court. [20211]

Wherefore, petitioner prays that said Itemization of Liability for Wages Incurred be approved by this Honorable Court and that the Clerk of this Court be instructed to pay the said sum of \$411.90 to said Special Master out of the funds of the Long Beach Federal Savings and Loan Association on deposit in the Registry of this Court.

/s/ RONALD WALKER,
Special Master. [20212]

The foregoing Itemization of Liability incurred for wages by said Special Master for the period between September 29, 1950, and October 30, 1950, is hereby approved and the Clerk of this Court is instructed to pay to said Special Master the said sum of \$411.90 from the funds of the Long Beach Federal Savings and Loan Association on deposit in the Registry of the Court.

Dated this 1st day of November, 1950.

/s/ PEIRSON M. HALL,
District Judge.

I hereby consent to and approve the foregoing order.

Dated: November 1, 1950.

/s/ CHARLES K. CHAPMAN,
Attorney for Long Beach
FS&LA.

[Marginal Note]: 11/1/50. Received check for \$411.90. /s/ Ronald Walker. [20213]

Name	No. Hrs.	Rate	Total
Mary Mild 9/29-10/30	71½	1.25	\$ 89.40
Margaret Johnson 9/29-10/30	112	1.25	140.00
Margaret Darneal 9/29-10/30	10½	1.50	13.75
Minnie Eyrich 9/29-10/30	7½	1.25	8.75
Mack M. Racklin (Court Reporter—per statement) (covers period 9/29 thru 10/30 only)			160.00
			<hr/> \$411.90

I hereby certify that the foregoing is a true and correct itemization of liability incurred by me as Special Master in the above-entitled action for wages of personnel employed by me for the period beginning September 29, 1950, and ending October 30, 1950.

/s/ RONALD WALKER,
Special Master.

[Endorsed]: Filed November 1, 1950. [20214]

[Title of District Court and Cause.]

OBJECTION AND POINTS AND AUTHORITIES IN SUPPORT THEREOF, TO PETITION OF SPECIAL MASTER FOR FURTHER PARTIAL INTERIM ALLOWANCE ON FEES DATED OCTOBER 25, 1950

Come Now the Home Loan Bank Board, an agency of the Executive Branch of the Government of the United States, William K. Divers, Chairman; J. Alston Adams, Member, and O. K. LaRoque, Member, of the Home Loan Bank Board, and the Federal Savings and Loan Insurance Corporation, a corporate instrumentality of the United States wholly owned by the United States, and without waiving their objections to the jurisdiction of the Court over their respective persons and their other objections, including objections to the venue, but specifically reserving and asserting the same, file this their Opposition to the Petition of the Special Master for Further Partial Interim Allowance Upon Fees Dated October 25, 1950.

This Opposition is made upon the ground that this Court has no jurisdiction in the above-entitled actions, in that this Court has no [20215] jurisdiction over the subject matter of the above-entitled actions, or over the persons filing this Opposition, for the following reasons, and on the basis of the following authorities:

(a) The creation and readjustment of Federal Home Loan Bank districts is a matter for deter-

mination by the Home Loan Bank Board and not by the Courts.

12 U.S.C. 1223

(b) The creation of Federal Home Loan Banks, and the dissolution, liquidation and reorganization of Federal Home Loan Banks, are each and all of them matters for determination by the Home Loan Bank Board and not by the Courts.

12 U.S.C. 1245, 1246

(c) The regulation and control of every Federal Home Loan Bank and of the Federal Home Loan Bank system are vested in the Home Loan Bank Board and not in the Courts.

12 U.S.C. 1221 et seq., 1232

(d) Neither the former Federal Home Loan Bank of Los Angeles nor the members thereof, nor any of them, have any legal interest in the continued existence of said former bank, or in the number of Federal Home Loan Banks, or in the location thereof.

(e) This Court lacks jurisdiction over the persons of indispensable parties to the above-entitled consolidated actions.

12 U.S.C. 1421 et seq.;

Hagan v. Central Avenue Dairy, Inc.,

C.C.A. 9, Jan. 4, 1950, #12,211

(f) There has been a failure to exhaust administrative remedies.

24 Code of Federal Regulations, 1949

Edition, Chapter 1, including Part 107

(g) The subject matter of the above-entitled consolidated actions is for administrative determination.

(h) The above-entitled consolidated actions constitute a collateral attack upon administrative orders, decisions and determinations. [20216]

(i) None of the above-entitled consolidated actions are actions to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within this district.

(j) None of the above-entitled consolidated actions are, nor do they involve, any action in interpleader or in the nature of interpleader upon which an order for substituted service may legally be pressed.

(k) None of the parties to this opposition have been properly served with process.

(l) The above-entitled consolidated actions, and each of them, are suits against the United States, and the United States has not consented to be sued therein.

(m) The Home Loan Bank Board is an unincorporated agency of the United States, and has no power to sue or be sued.

12 U.S.C. 1421 et seq.

(n) The complaints, cross-complaints, third-party complaints, petitions, cross-claims and third-party claims, including all alleged interpleaders and interventions, and each and all of them, fail to state any claim upon which relief can be granted.

There are incorporated herein and made a part

hereof by this reference, the "Memorandum of Points and Authorities" filed by defendants Home Loan Bank Board, et al., on September 13, 1948, in support of "Motion Pursuant to Rule 12(d) and to Dismiss"; the "Memorandum of Points and Authorities" filed by the Federal Savings and Loan Insurance Corporation on November 22, 1948; the "Consolidated Points and Authorities" filed by the Federal Home Loan Bank of San Francisco, et al., on July 30, 1948; and the "Points and Authorities" filed by the Federal Home Loan Bank of San Francisco, et al., on September 14, 1948.

Respectfully submitted,

ERNEST A. TOLIN,

United States Attorney,

CLYDE C. DOWNING, and

ARLINE MARTIN,

Assistant U. S. Attorneys.

By /s/ ARLINE MARTIN,

Attorneys for Home Loan Bank Board, Wm. K. Divers, Chairman; J. Alston Adams, Member; O. K. LaRoque, Member, of the Home Loan Bank Board, and the Federal Savings and Loan Ins. Corp., a Corporate Instrumentality of the United States Wholly Owned by the United States.

[Endorsed]: Filed November 2, 1950. [20217]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ANSWER OF FEDERAL HOME LOAN BANK OF SAN FRANCISCO TO INTERIM REPORT OF SPECIAL MASTER ON PROGRESS OF DISCOVERY AND ACCOUNTING AND PETITION FOR FURTHER PARTIAL INTERIM ALLOWANCE ON FEES, AND OBJECTIONS OF FEDERAL HOME LOAN BANK OF SAN FRANCISCO TO ALLOWANCE OF SPECIAL MASTER'S FEES AGAINST FEDERAL HOME LOAN BANK OF SAN FRANCISCO OR OUT OF THE PROPERTY OR FUNDS OF FEDERAL HOME LOAN BANK OF SAN FRANCISCO DEPOSITED WITH THE REGISTRY OF THE COURT

I.

Court is without jurisdiction to appoint [20224] special master or award fees for services as such.

The court lacks jurisdiction of the subject matter of the several matters heretofore referred to the Special Master and of the persons of objecting parties herein for all of the reasons specifically set forth in all those certain pleadings, motions, memoranda of points and authorities and other papers and documents specifically referred to in paragraph I of the Answer of Federal Home Loan Bank of San Francisco to Interim Report of Special Master on Progress of Discovery and Accounting and Petition

for Further Partial Interim Allowance on Fees, and Objections of Federal Home Loan Bank of San Francisco to Allowance of Special Master's Fees Against Federal Home Loan Bank of San Francisco or Out of the Property or Funds of Federal Home Loan Bank of San Francisco Deposited With the Registry of the Court and incorporated in said answer and objections and herein by such reference.

II.

Master's Compensation cannot be paid from funds of San Francisco Bank.

Rule 53 (Rules of Civil Procedure) permitting payment of Master's compensation out of any fund which is in the custody of the court does not authorize payment out of funds of Federal Home Loan Bank of San Francisco on deposit in registry of court. Such funds, irrespective of the deposit in court pursuant to court order, are security for obligations of Long Beach Association to Federal Home Loan Bank of San Francisco and as such the funds are first chargeable with the payment of said obligations. Where funds in court are subject to prior liens or chargeable for payment of prior claims, they are not available for the payment of Master's fees.

Buell v. Kanawha Lumber Co.,
201 F. 762, 772. [20225]

III.

The San Francisco Bank is not primarily liable for payment of Master's fees.

The party at whose instance the services of the

Master are rendered is primarily liable to the Master for compensation for such services.

Brickill v. New York,

55 F. 565

Gold Seal Importers v. Morris White Fashions, 4 F.R.D. 386, 389

Boone v. Boone,

127 Atl. 819 (N. J.)

City Bldg. Loan Assn. v. Adler,

176 Atl. 175 (N. J.)

And sums paid by the prevailing party pursuant to prior court order may be imposed upon the defeated party upon the final decree.

Brickill v. N. Y.,

Supra

Rauer v. Hatfield,

295 F. 48

IV.

Fees cannot be awarded for services outside scope of order of reference.

A special master is not entitled to compensation for services not required by an order of reference.

Foster v. Ingham, Circuit Judge,

87 N. W. 258 (Mich.)

VERNE DUSENBERY,

PHILIP H. ANGELL,

BISHOP & HOFFMAN,

By /s/ PHILIP H. ANGELL,

Attorneys for Federal Home Loan Bank of San Francisco.

[Title of District Court and Cause.]

AFFIDAVIT OF FRANK C. NOON

State of California,
County of Los Angeles—ss.

Frank C. Noon, being duly sworn, deposes and says:

1. That I am the Vice President of Federal Home Loan Bank of San Francisco, and Manager of the Los Angeles Branch of said Bank, and as such have custody, control and supervision of certain of the records of said Bank.

2. That as of this 6th day of November, 1950, the Long Beach Federal Savings and Loan Association is indebted to the Federal Home Loan Bank of San Francisco in the total sum of [20227] \$6,300,000.00 represented by four (4) promissory notes, and that there is interest accrued and accruing and unpaid on said notes at the rate of two per cent (2%) per annum in the amount of \$359,-013.70, as of this 6th day of November, 1950, after crediting the sum of \$6,084.00 to the total interest due on said promissory notes, which credit represents dividends paid by the Federal Home Loan Bank of San Francisco on January 11, 1950, and June 30, 1950. That accordingly, as of this 6th day of November, 1950, there is a total sum due, owing and unpaid to Federal Home Loan Bank of San Francisco by way of principal and interest the sum of \$6,652,929.70, accruing interest. That on February 26, 1950, there was accumulated and un-

paid interest on the United States Government Bonds hereinafter mentioned in the sum of \$277,-851.23.

3. That to secure the payment of said advances represented by said promissory notes, in accordance with the terms and provisions of the Federal Home Loan Bank Act, subordination agreements, application for advances and pledge agreements, Long Beach Federal Savings and Loan Association and/or A. V. Ammann deposited with, delivered to, assigned, transferred to and pledged with Federal Home Loan Bank of San Francisco, collateral which Federal Home Loan Bank of San Francisco now holds as pledgee (which, however, has been deposited in the Registry of this Court, and is now in the possession of the Federal Reserve Bank of San Francisco at its Los Angeles Branch) consisting of United States Government Coupon Bearer Bonds in the aggregate face amount of \$5,300,000.00. That there has been deposited in the Registry of the above-entitled Court the sum of \$1,000,000.00 as additional security for the promissory notes hereinbefore mentioned, which sum of \$1,000,000.00 by order of this Court was made additional security in lieu of other collateral security which was released by order of this [20228] Court to Long Beach Federal Savings and Loan Association.

4. That affiant is informed and believes that the matters hereinbefore set forth are true and correct in all respects, according to the records in his pos-

session and the information that has been furnished him by his counsel.

/s/ FRANK C. NOON.

Subscribed and sworn to before me this 6th day of November, 1950.

[Seal] /s/ PETER T. RICE,
Notary Public in and for
Said County and State.

[Endorsed]: Filed November 6, 1950. [20229]

[Title of District Court and Cause.]

ANSWER OF FEDERAL HOME LOAN BANK
OF SAN FRANCISCO TO INTERIM RE-
PORT OF SPECIAL MASTER ON PROG-
RESS OF DISCOVERY AND ACCOUNT-
ING AND PETITION FOR FURTHER
PARTIAL INTERIM ALLOWANCE ON
FEES, AND OBJECTIONS OF FEDERAL
HOME LOAN BANK OF SAN FRANCISCO
TO ALLOWANCE OF SPECIAL MAS-
TER'S FEES AGAINST FEDERAL HOME
LOAN BANK OF SAN FRANCISCO OR
OUT OF THE PROPERTY OR FUNDS OF
FEDERAL HOME LOAN BANK OF SAN
FRANCISCO DEPOSITED WITH THE
REGISTRY OF THE COURT

Comes Now Federal Home Loan Bank of San
Francisco, defendant in Civil Action No. 5678-PH
(W.M.) and cross-defendant and third-party de-

fendant in Civil Action No. 5421-PH, and without waiving any of its objections heretofore [20230] made in either of said actions as to venue or jurisdiction of the court over the person of this defendant or the subject matter of said actions or either thereof, but specifically reserving and asserting said objections and each one thereof, and answers that certain Interim Report of Special Master on Progress of Discovery and Accounting and Petition for Further Partial Interim Allowance on Fees dated October 25, 1950, and filed on behalf of the Special Master in the above-consolidated actions, and respectfully objects to said interim report and to the allowance of any Special Master's fees whatsoever to said petitioner as against the Federal Home Loan Bank of San Francisco or out of any of the property or funds of the Federal Home Loan Bank of San Francisco deposited in the registry of the court pursuant to order of the court, upon the grounds and authorities hereinafter set forth and those incorporated herein by reference.

I.

Federal Home Loan Bank of San Francisco hereby refers to the pleadings, motions, points and authorities and other documents hereinafter set forth in this paragraph I with like force and effect as if each one were herein set forth in full:

Complaint in Federal Home Loan Bank of Los Angeles, a body Corporate, et al., plaintiffs, vs. Federal Home Loan Bank of Portland, et al., defendants, Action numbered 5678 (W.M.); Motion

of Federal Home Loan Bank of San Francisco to dismiss said complaint and memorandum of points and authorities filed in support thereof; Answer of Federal Home Loan Bank of San Francisco to said complaint;

First Amended and Supplemental Complaint to Cancel the Fraudulent and Void Appointment of Conservator, to Quiet Title, for Return of Property, Declaratory Relief, Accounting and Injunction, in Action 5421; Motion of Federal [20231] Home Loan Bank of San Francisco, William A. Davis and Gerrit and Vander Ende to Dismiss said First Amended and Supplemental Complaint and for Summary Judgment, and Memorandum of Points and Authorities filed in support thereof; and Answer of said Federal Home Loan Bank of San Francisco, William A. Davis and Gerrit Vander Ende to said First Amended and Supplemental Complaint;

Third-Party Complaint of Long Beach Federal Savings and Loan Association and Motion of Federal Home Loan Bank of San Francisco for Summary Judgment or to Dismiss said Third-Party Complaint in Action 5421, dated in January, 1948, and Points and Authorities in Support of said motion;

Answer of Long Beach Federal Savings and Loan Association to: (1) Plaintiff's First Amended and Supplemental Complaint; (2) Cross-Claim in Interpleader of Defendant Title Service Company; (3) Cross-Claim in Interpleader of Defendant Robert H. Wallis; and Amended Cross-Claim of

of San Francisco to Allowance of [20233] Special Master's Fees Against Federal Home Loan Bank of San Francisco on Account of the Property or Funds of Federal Home Loan Bank of San Francisco Deposited With the Registry of the Court, and Memorandum of Points and Authorities in Support Thereof, filed on or about March 6, 1950.

II.

That there are on deposit in the registry of the court in said action No. 5421, with which said action, action No. 5678 has been consolidated, promissory notes aggregating the face amount of \$6,300,000 executed by said Long Beach Federal Savings and Loan Association (hereinafter referred to as Long Beach Association), payable to Federal Home Loan Bank of San Francisco (hereinafter referred to as San Francisco Bank), together with collateral held as security for said promissory notes consisting of United States bonds of the face value of \$5,300,000 and \$1,000,000 in cash, which said sum of \$1,000,000 was substituted in the place and stead of various promissory notes and deeds of trust aggregating a larger amount, and which said promissory notes and deeds of trust were returned to said Long Beach Association by order of court. Said promissory notes of said Long Beach Association and said collateral were deposited in the registry of the court in said action No. 5421 pursuant to order of court in connection with a purported interpleader proceeding commenced by said Long Beach Association against said San Fran-

cisco Bank and the Federal Home Loan Bank of Los Angeles (hereinafter referred to as Los Angeles Bank), as the alleged rival claimants to the proceeds of said promissory notes. Said promissory notes are alleged to be and are the sole and exclusive property of the San Francisco Bank and said collateral hereinabove specifically set forth securing said promissory notes is the property of and owned by said Long Beach Association, subject, however, to a lien [20234] thereon by way of a pledge to said San Francisco Bank for the security of said promissory notes in the aggregate amount of \$6,300,000, and said San Francisco Bank as such pledgee is entitled to hold and retain said collateral and each and every part thereof until said promissory notes and each one thereof have been paid in full. That said San Francisco Bank objects to the payment of any Special Master's fees out of said collateral, or any part thereof, securing said promissory notes of said Long Beach Association to said San Francisco Bank so deposited in the registry of the court as hereinabove specifically alleged. That said San Francisco Bank further alleges that no part of the principal of said promissory notes of said Long Beach Association to said San Francisco Bank as hereinabove specifically set forth has been paid and that no interest has been paid on account of said promissory notes or any thereof since prior to January of 1948. That all of said promissory notes and interest on said promissory notes and each one thereof, is now due, owing and unpaid from said Long Beach Association to said San

Francisco Bank as of the date hereof. Said San Francisco Bank further alleges that said loans were made to said Long Beach Association under and by virtue and pursuant to the provisions of the Federal Home Loan Bank Act, as amended, including Section 10 of said Act, the Home Owners' Loan Act of 1933, as amended, and rules and regulations adopted pursuant to the provisions of said Acts and each one thereof. That by virtue of said Federal Home Loan Bank Act, as amended, the Home Owners' Loan Act of 1933, as amended, and rules and regulations adopted pursuant to the provisions of said Acts and each one thereof, all loans made by said San Francisco Bank are required to be secured in the manner and in the amount specifically provided in said Acts and each one thereof and said rules and regulations adopted pursuant thereto. That said collateral securing said [20235] promissory notes of said Long Beach Association to said San Francisco Bank was pledged to said San Francisco Bank under the requirements of said Acts and each one thereof and the rules and regulations adopted pursuant thereto, and there exists no authority of law for the reduction or changing of said security on said promissory notes or either thereof by order of court or otherwise or at all.

III.

That the court has no jurisdiction over said promissory notes or any thereof of said Long Beach Association payable to said San Francisco Bank which are now retained in the registry of the court,

or over the funds and Government bonds, or any thereof, of said Long Beach Association pledged and held as collateral security for said promissory notes or any thereof, and said funds and property may not lawfully be invaded or used by the court for the purpose of paying Special Master's fees, or for any other purpose.

IV.

In addition to the aforesaid notes and collateral securing the same, constituting the property of the San Francisco Bank, the following funds on deposit in the registry of the court were deposited pursuant to purported interpleaders and interventions:

(a) Notes and deeds of trust with an aggregate value of approximately \$800,000 deposited by Title Service Company contending that Title Service Company was faced with conflicting claims of the conservator, on the one hand, and the Long Beach Association, on the other, as to whether reconveyance of property securing said notes should be made upon payment of said notes to the conservator. All of said notes and deeds of trust have now either been paid or returned to said association;

(b) The sum of approximately \$1,500,000 paid into Court [20236] pursuant to orders of court by the conservator and borrowers from the association, representing payments in full of notes owed to the association, including the notes theretofore deposited in court by Title Service Company, upon receipt of which the court ordered execution of

reconveyances to such borrowers of property securing such obligations; said payments were thereafter, upon application of said association, ordered to be held in the registry of the court as substituted collateral securing in part the \$6,300,000 of notes owned by San Francisco Bank and deposited as aforesaid;

(c) Cashier's check in the amount of \$50,000 payable to Robert H. Wallis deposited by said Wallis upon the contention that he was unable to ascertain whether such funds were to be expended by him for the purpose for which he received it from said association or the claim of the conservator that it be returned to the association;

(d) The sum of \$36,485.25 paid into court by said association as disputed premiums allegedly claimed by Federal Savings and Loan Insurance Corporation to be due it on account of insurance by it of amounts on deposit with said association;

(e) The sum of \$18,503.52 rent paid into court subsequent to the termination of the conservatorship by defendant and cross-complainant, George Turner, in connection with rental of premises owned by said association upon the contention that said Turner was uncertain whether such payment should be made during the period of the conservatorship to said conservator or to said association. That, except as to said notes in the amount of \$6,300,000 owned by San Francisco Bank and the collateral and substituted collateral, securing the same, all other moneys, funds and property on deposit in the registry of court in said consolidated actions

are the property of said association and may be withdrawn by said association at will; that since the [20237] termination of the conservatorship no possible controversy exists as to the right of said association to said funds and no other party to said litigation asserts any claim thereto. That there are no general funds on deposit in the registry of court herein from which an award of fees for the Special Master can be made. That the only funds on deposit in the registry of court which are not subject to withdrawal by said Association at will are the collateral and substituted collateral securing the aforesaid notes owned by San Francisco Bank. That accordingly any order for payment of fees of the Special Master or any other disbursement from funds on deposit in court herein will of necessity constitute a payment from collateral and substituted collateral securing said notes owned by San Francisco Bank and an unlawful and unwarranted invasion thereof.

V.

Said San Francisco Bank further alleges that no fees can be allowed as against said San Francisco Bank or out of the property, funds or assets of said San Francisco Bank on deposit in the registry of the court as hereinabove set forth or out of any funds on deposit in the registry of the court, for services rendered by said Special Master in connection with the accounting between A. V. Ammann as conservator for said association and said association for the reason that the court is without juris-

diction over said accounting in that the exclusive method of accounting and release for conservators appointed under the Home Owners' Loan Act of 1933, as amended, is that prescribed by Section 147.9 (formerly 207.9) of Title 24 of the Code of Federal Regulations (1949 edition), which provides for an administrative accounting and release by the Home Loan Bank Board (24 C.F.R. (1949 edition) 147.9). The reports and other inventories and statements required under said regulations must be made and filed as public records, open to public inspection, [20238] with full opportunity for filing objections and administrative hearings thereon. The court, lacking jurisdiction over said accounting between said A. V. Ammann as such conservator and said Long Beach Association, has no power to appoint a Special Master to supervise such accounting, and accordingly no fees may be allowed to said Special Master for services rendered in connection with or for supervising such accounting.

Assuming for argument only that the court had jurisdiction to appoint a Special Master to supervise said accounting between said A. V. Ammann as such conservator and said Long Beach Association and to allow compensation to such Special Master for said services, the court cannot allow any compensation to said Special Master as against said San Francisco Bank or out of the property or funds of said San Francisco Bank deposited in the registry of the court as hereinabove set forth for the reason that said San Francisco Bank is not

concerned with and has no interest in said accounting or any part thereof and is not a party thereto.

VI.

Said San Francisco Bank further alleges that no fees can be allowed as against said San Francisco Bank or out of the property, funds or assets of said San Francisco Bank on deposit in the registry of the court as hereinabove set forth or out of any funds on deposit in the registry of the court, for services rendered by said Special Master in connection with the inspection and production of records, documents and papers of the said San Francisco Bank for the reason that the said inspection, and each and every part thereof, is not authorized under Rule 34 of the Federal Rules of Civil Procedure. Said San Francisco Bank hereby refers to the "Motion for Production of Records, etc., Under Rule 34" filed on the 4th day of October, 1948, in said action numbered 5421 by plaintiffs Mallonee, [20239] et al., and defendant, third-party plaintiff and cross-complainant Long Beach Federal Savings and Loan Association, "Grounds of Opposition and Objections to Motion of Plaintiff and Third-Party Plaintiff and Cross-Complainant Long Beach Federal Savings and Loan Association for Production of Documents, etc. Under Rule 34, Motion to Dismiss and Memorandum of Points and Authorities" filed by said San Francisco Bank, William A. Davis and Gerrit Vander Ende in opposition to said motion, and "Opposition to Motion of Plaintiffs and Third-Party Plaintiff and Cross-

Complainant for Production of Documents, etc., Under Rule 34 and Grounds Thereof," "Memoranda of Points and Authorities in Support of Opposition to Motion Under Rule 34," filed by Home Loan Bank Board, William K. Divers, J. Alston Adams and O. K. LaRoque in opposition to said motion of said plaintiffs and said Long Beach Association, and by said reference makes said pleadings, motions, objections and points and authorities a part hereof with like force and effect as if the same were herein set forth in full. San Francisco Bank further alleges that said inspection is in violation of said Rule 34 of the Federal Rules of Civil Procedure and constitutes a fishing expedition not warranted under said Rule 34 or under authority of law. That said San Francisco Bank has cooperated to the fullest extent in the conduct of said discovery proceedings, and is in nowise responsible for the extended prolongation of said proceedings. That said proceedings serve no useful purpose and are continued for the sole purpose of harassing and embarrassing the San Francisco Bank, its officers and employees, and impeding the efficient and proper operation of said San Francisco Bank.

VII.

Said San Francisco Bank further alleges that it does not appear from said interim report of the Special Master that all [20240] of the services alleged to have been rendered and for which compensation is sought were necessarily rendered within the scope of any order or orders of reference to said Special Master.

VIII.

Said San Francisco Bank further alleges that said Special Master has rendered no services for which said San Francisco Bank can now or hereafter be charged or for which an allowance may be made out of property or funds of said San Francisco Bank deposited in the registry of the court as hereinbefore set forth or from any funds deposited in the registry of the court herein.

IX.

Said San Francisco Bank further alleges that any fees allowed at this time to said Special Master can only be allowed directly against the party for whom said services were rendered and at whose instance said services were required. That the services of said Special Master for which compensation is now sought were rendered at the instance of and for the benefit of said Long Beach Federal Savings and Loan Association and said services should be paid for by said Association. That said Special Master has not rendered any services of any kind or character at the instance of or to or for said San Francisco Bank and no portion of the compensation sought can be allowed as against said San Francisco Bank in these actions, or either one thereof.

X.

In opposition to said petition of said Special Master for further partial interim allowance on fees, said San Francisco Bank will rely upon this answer and all pleadings, motions, points and

authorities and other papers and documents incorporated [20241] herein by reference, upon the pleadings, motions, records and files in the above-entitled consolidated actions and each one thereof, and upon the affidavit of Frank C. Noon and the Memorandum of Points and Authorities attached hereto.

Wherefore, said San Francisco Bank prays that said Special Master take nothing by his petition for further partial interim allowance upon fees as against Federal Home Loan Bank of San Francisco, one of the defendants, cross-defendants and third-party defendants in the above-entitled actions and each one thereof, and that no allowance be made to said Special Master out of the property or funds of said Federal Home Loan Bank of San Francisco deposited with the registry of the court or out of any funds deposited with the registry of the court in said actions.

VERNE DUSENBERY,

PHILIP H. ANGELL,

BISHOP & HOFFMAN,

By /s/ PHILIP H. ANGELL,
Attorneys for Federal Home Loan Bank of San
Francisco. [20242]

State of California,
City and County of San Francisco—ss.

Frederick W. Ruble, being by me first duly sworn,
deposes and says:

That he is the President of the Federal Home Loan Bank of San Francisco, a Federal Corporation, one of the defendants, cross-defendants and third-party defendants in the above-entitled action; that he makes this verification for and on behalf of said corporation; that he has read the foregoing Answer of Federal Home Loan Bank of San Francisco to Interim Report of Special Master on Progress of Discovery and Accounting and Petition for Further Partial Interim Allowance on Fees, and Objections of Federal Home Loan Bank of San Francisco to Allowance of Special Master's Fees Against Federal Home Loan Bank of San Francisco or Out of the Property or Funds of Federal Home Loan Bank of San Francisco Deposited With the Registry of the Court, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ FREDERICK W. RUBLE.

Subscribed and sworn to before me this 3rd day
of November, 1950.

[Seal] /s/ CLARA H. COOPER,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires January 10, 1953. [20243]

Receipt of a copy of the within Answer of Federal Home Loan Bank of San Francisco to Interim Report of Special Master on Progress of Discovery and Accounting and Petition for Further Partial Interim Allowance on Fees, and Objections of Federal Home Loan Bank of San Francisco to Allowance of Special Master's Fees Against Federal Home Loan Bank of San Francisco or Out of the Property or Funds of Federal Home Loan Bank of San Francisco Deposited With the Registry of the Court and Affidavit of Frank C. Noon and Memorandum of Points and Authorities in support of said Answer and Objections, is hereby acknowledged this 6th day of November, 1950, at the hour of 10:12 o'clock a.m. of said day.

WESTOVER & SMITH,

By /s/ WYCKOFF WESTOVER,

Attys. for Pl. in 5421-P.H.

/s/ RONALD WALKER,

Special Master.

Nov. 6th, 1950, at 10:15 a.m.

/s/ CHARLES K. CHAPMAN,

Atty. for L. B. Federal
S. & L. Assn.

Nov. 6, 1950, at 10:15 a.m.

O'MELVENY & MYERS,

By /s/ BENNETT W. PRIEST,

Attys. for Federal Home Loan
Bank of Los Angeles.

Nov. 6, 1950, at 10:45 a.m.

/s/ PAUL FITTING,

Ass't U. S. Atty.,

Atty. for Official Defendants.

[Endorsed]: Filed November 6, 1950. [20244]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between Ronald Walker, Special Master in the above-entitled matter, and Bishop & Hoffmann, that Federal Home Loan Bank of San Francisco, and all other parties, may have to and including Monday, November 6th, 1950, within which to file any replies, opposition or other pleadings in response to Interim Report of Special Master on Progress of Discovery and Accounting and Petition for further Partial Interim Allowance on fees.

Dated: November 3rd, 1950.

/s/ RONALD WALKER,

Special Master.

BISHOP & HOFFMANN,

By /s/ SYLVESTER HOFFMANN,

Attorneys for Federal Home Loan Bank of San Francisco. [20245]

ORDER

Upon reading the foregoing Stipulation and good cause appearing therefor, It Is So Ordered.

Dated: November 6th, 1950.

/s/ PEIRSON M. HALL,
Judge of United States
District Court.

[Endorsed]: Filed November 6, 1950. [20246]

At a stated term, to wit: The September Term, A.D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 6th day of November, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Peirson M. Hall,
District Judge.

[Title of Cause.]

MINUTE ORDER

For hearing on motion for approval of interim report of Special Master, and for allowance of interim fees to Ronald Walker, Special Master; Wyckoff Westover, Esq., appearing as counsel for plaintiffs and Shareholders Protective Committee; Ronald Walker, Special Master, present; Chas. K. Chapman, Esq., appearing as counsel for defendant

Long Beach Fed. Svgs. & Loan Assoc.; Bennett W. Priest, Esq., appearing as counsel for Fed. Home Loan Bank of L. A.; Irving Bishop and P. N. Angell, Esqs., appearing as counsel for defendants Fed. Home Loan Bank of San Francisco; Paul Fitting, Ass't U. S. Att'y, appearing as counsel for Fed. Home Loan Bank Board, John H. Fahey, and A. V. Ammann;

Filed stipulation of Fed. Home Loan Bank of San Francisco for extension of time to Nov. 6, 1950, to file reply, opposition, etc., to interim report of Special Master; filed answer of Fed. Home Loan Bank of San Francisco to interim report of Special Master; filed memo. of points and authorities in support of answer to interim report of Special Master; filed affidavit of Frank W. Noon in support of answer to interim report of Special Master.

Court hears argument of counsel on motion for approval of interim report and for allowance of interim fees to Special Master Ronald Walker.

Frank W. Noon is called, sworn, and testifies on cross-exam. of affidavit filed this date. [20251]

Motion of Long Beach Fed. Svgs. & Loan Assoc. to strike affidavit of Frank C. Noon is denied, but affidavit is stricken on the Court's own motion on the ground that it is immaterial.

Court orders cause submitted on motion for approval of interim report and for allowance of interim fees to Special Master.

[Title of District Court and Cause.]

ORDER FOR PARTIAL INTERIM ALLOW-
ANCE OF FEES TO SPECIAL MASTER

The petition of Ronald Walker, Special Master, in the above-entitled actions for a partial interim allowance of fees having come on for hearing on the 6th day of November, 1950, before the Honorable Peirson M. Hall, District Judge, and there being present the following counsel: Charles K. Chapman, Esq., for Long Beach Federal Savings and Loan Association; Westover & Smith, Esqs., by Wyckoff Westover, of counsel for the plaintiffs Mallonee, et al.; Irving G. Bishop and Philip H. Angell, Esqs., for defendants Federal Home Loan Bank of San Francisco; O'Melveny & [20253] Myers, by Bennett W. Priest, Esq., of counsel for the Federal Home Loan Bank of Los Angeles; Ernest A. Tolin, United States Attorney, by Paul Fitting, Assistant United States Attorney, for the Official Defendants, and it appearing to the satisfaction of the Court that due notice had been given of the hearing upon the said petition for partial interim allowance of fees, and that previous interim partial allowance of fees have been made from time to time to said Special Master in the total sum of \$50,000.00, and the Court having reserved the right to grant further allowances upon the petitions of said Special Master for partial interim allowance of fees, and the Court having given further consideration to the First and Second Interim Reports

of said Special Master and to the Report of said Special Master filed November 29, 1949, upon the Nature, Type and Character of the records and files maintained by the Federal Home Loan Bank of San Francisco in connection with the discovery proceedings herein and the interim report of said Special Master filed February 24th, 1950, and other interim reports upon the progress of the Accounting and Discovery Proceedings and the pending petition for a partial interim allowance of fees to the Special Master, and heard statements of the Special Master as to the nature and extent of his services; and it appearing to the satisfaction of the Court and the Court finds that said Special Master has performed services pursuant to his Orders of appointment of such nature as to entitle him to a further partial interim allowance on account of fees, and that such services, among other things, have included the supervision, direction and control of the transfer of certain of the assets of the Long Beach Federal Savings and Loan Association, from the custody and possession of A. V. Ammann, as purported conservator, to the officers and directors of said association, in conformity to date with such order of appointment and in such manner, among other things, as to maintain public confidence in a financial institution involving allegedly some \$26,000,-000.00 of assets, [20254] and allegedly some 16,000 shareholder depositors and 8,000 borrower members, the title to whose home have been allegedly clouded and in the supervision and control of an election of directors and officers of said Long Beach Federal

Savings and Loan Association, and has included hearings upon the discovery proceedings herein, and the consideration and analysis of the accounting filed by said A. V. Ammann, and of the preliminary objections thereto, including hearings thereon, and in attendance upon and participation in each and all of the hearings of Court held herein, and that such attendance and participation was necessary in connection with the orders of reference herein, and further, that such services have been rendered over a period of more than two years and nine months since the date of his appointment and will be required for many months subsequent hereto, and that it is unreasonable to compel said Special Master to await the termination of the above-entitled actions for an allowance of fees herein.

That since the last preceding partial interim allowance of fees said Special Master has presided over 61 hearings upon the Discovery Proceedings upon the dates set forth in his petition and has rendered other services necessary and incident to his duties as Special Master as set forth in his petition requiring fifteen and one-half days of his time in office work at his office, at the office of the Long Beach Federal Savings and Loan Association, the Los Angeles office of the Home Loan Bank of San Francisco and in Court.

That the duties of the Special Master in presiding over the discovery hearings are both onerous and tedious and are such as to require practically all of his time and prevent his accepting other substantial and gainful work in his private practice of law.

That the Special Master has received and marked for identification 1031 exhibits, each containing letters, documents, etc., well [20255] in excess of 50,000, each of which has been numbered for identification. Reproduction of material requested by the parties seeking the discovery has been done by photostating and microfilming. 56 reels of microfilm have been taken and developed. \$4,949.15 has been expended by the parties for photostating.

That it is essential both for the Discovery Proceeding and in connection with the proposed deposition of defendant John H. Fahey, that the inspection of documents continue under the Special Master in order to protect and preserve the objections, both of the Home Loan Bank of San Francisco and the Official Defendants, and to prevent the disclosure of privileged or confidential information in the public interest, and to permit the orderly inspection of files and documents and to prevent serious disruption of the business of the Home Loan Bank of San Francisco.

That such services have been rendered in such manner as to entitle said Special Master presently to a substantial partial interim allowance on his fees herein and the Court further finds that the services of said Special Master prior to November 6, 1950, are of the reasonable value of \$60,000 and more, and that a further interim partial allowance of \$10,000 at this time is meet and proper.

That it would be improper and unreasonable at this time to assess the fees of said Special Master

against any of the parties to the proceeding or to allocate the value of said services to any particular phase of the services rendered by said Special Master, or to assess the fees of the Special Master against any parties to said litigation or claimant to said funds. That there is on deposit in the Registry of the Court the sum of \$1,311,001.98, in cash, which sum has accumulated from the deposit in Court in connection with the various intervenor and interpleader petitions filed herein, and from the interpleaders by the Long Beach Federal Savings and Loan Association of the sums [20256] of \$55,487.25, in connection with sums claimed to be due to the Federal Savings and Loan Insurance Corporation, and from the interpleaders of George Turner, in the sums of \$18,503.52. That there is also on deposit in the Registry of the Court promissory notes executed by A. V. Ammann, as Conservator, of the Long Beach Federal Savings and Loan Association, payable to the Federal Home Loan Bank of San Francisco, in the aggregate sum of \$6,300,000.00 and the sum of \$5,300,000.00 in United States Bonds, which are held as security for said \$6,300,000.00 of promissory notes.

That it appears from the affidavit of Frank C. Noon, dated March 5, 1948, and filed in connection with the order impounding the \$6,300,000.00 of notes, that there is pledged with the San Francisco Bank, as pledgee, 6084 shares of stock of the San Francisco Bank, with a total par value of \$608,400.00. That both the San Francisco Bank and the

Long Beach Association are allegedly multi-million dollar institutions. That a partial interim allowance of fees to the Special Master at this time will not impair or affect the security or the ultimate collectibility of the aforesaid notes aggregating \$6,300,000.00.

That pursuant to Rule 53 FRCP, the partial interim fees allowed to said Special Master should be paid out of such funds on deposit in the Registry of the Court.

This is an interim order and is not a final determination of the issues material to the claim for fees for said Special Master as contemplated by Rule 54 (b) FRCP, and the Court reserves the power to modify, alter or amend this order at any time.

Now, Therefore, It Is Ordered and Adjudged that said Special Master be granted a further partial interim allowance on his fees herein in the sum of \$10,000 and the Clerk of this Court is directed to pay to Ronald Walker, Special Master the said sum of \$10,000 from the funds impounded in the above [20257] entitled litigation on deposit in the Registry of this Court.

It Is Further Ordered that the Special Master beginning January 1, 1951, shall report each thirty days thereafter as to the progress of the Discovery and Accounting Proceedings and shall submit with such report any further current requests for fees and expenses for services set forth in such report.

Notice of hearings upon such reports shall be given to all interested parties.

Dated: November 9th, 1950.

/s/ PEIRSON M. HALL,
District Judge.

[Marginal Note]: Received check \$10,000—
11/9/50.

/s/ RONALD WALKER.

[Endorsed]: Filed November 9, 1950. [20258]

At a stated term, to wit: The September Term. A. D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday the 16th day of November in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Peirson M. Hall,
District Judge.

[Title of Cause.]

MINUTE ORDER

Upon the suggestion of counsel for special subcommittee of the Committee on Executive Expenditures of the House of Representatives that the Committee desires to hold hearings in the State of Cali-

fornia, and in connection therewith to subpoena certain parties to the within action not residing in California who have not yet been served with process within the State of California, it is ordered that a special hearing in said actions be held on Friday, November 17, 1950, at 9:30 a.m., in court room No. 1, Federal Building, Los Angeles, California, and the Clerk is to notify all appearing counsel in said actions directed that you be then and there present on behalf of the parties you represent in said actions. [20288]

At a stated term, to wit: The September Term. A. D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday, the 17th day of November, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable Peirson M. Hall,
District Judge.

[Title of Cause.]

MINUTE ORDER

For hearing on request of special sub-committee of the Committee on Executive Expenditures of the House of Representatives, that it desires to hold hearings in State of Calif., and in connection therewith to subpoena certain parties; Wyckoff Westover, Esq., appearing as counsel for plaintiffs and Shareholders Protective Committee; W. I. Gilbert,

Jr., Esq., appearing as counsel for First Fed. Sav. & Loan Assoc., Wilmington; Frank G. Makepeace, Esq., appearing as counsel for Lillian Coggsell; Ronald Walker, Special Master, present; Hyman T. Fishback, Esq., 52 Wall St., New York City, appearing as counsel for sub-committee of Committee on Executive Expenditures of the House of Representatives; Chas. K. Chapman, Esq., appearing as counsel for defendant Long Beach Fed. Sav. & Loan Assoc.; Lyman B. Sutter, Esq., appearing as counsel for Title Service Co.; Raymond Tremaine, Esq., appearing as counsel for defendant Robert H. Wallis; Richard Fitzpatrick, Pierce Works, and Paul Fussell, Esqs., appearing as counsel for Fed. Home Loan Bank of L. A.; Irving Bishop, Esq., appearing as counsel for defendants Fed. Home Loan Bank of San Francisco, et al.; Arline Martin, Ass't U. S. Att'y, appearing as counsel for Fed. Home Loan Bank Board, John H. Fahey, and A. V. Ammann; Robert A. Moffit, Esq., appearing as counsel for Land Title Ins. [20289] Co.; James L. Burns, Esq., appearing as counsel for Pioneer Investors Sav. & Loan Assoc.; Chas. T. Smith, Esq., appearing as counsel for Harold Lee Newendorp, et al.; Thos. P. Menzies, Esq., appearing as counsel for Home Indemnity Co.; F. Henry NeCasek, Esq., appearing as counsel for Roy E. Hegg, George Turner, and Home Investment Co.; Hon. Chef Holifield, Congressman, present;

Court hears argument on said request of special sub-committee. Stipulation is filed, and order approving same. [20290]

[Title of District Court and Cause.]

STIPULATION

On the 17th day of November, 1950, proceedings transpired which are reflected in a reporter's transcript thereof, to be attached hereto, which transcript, among other things, reflects the appearances.

Now, Therefore, It Is Hereby Stipulated:

That the undersigned as counsel for the respective parties whom they represent and for whom they have appeared in the above-entitled consolidated actions, hereby waive the right, if any there be, of their respective clients to serve or attempt to serve in the State of California, process of this Court in the within consolidated action, upon any non-resident citizen or party to this litigation who has not heretofore been served with process of this Court in such consolidated actions within the territorial jurisdiction of this court, and whose presence in the State of California is in response and pursuant to process of the House of Representatives in [20291] connection with a proposed hearing within the State of California by a Sub-Committee of the Committee of the House of Representatives on Expenditures in Executive Departments, so long as such person shall be and remain in the State of California in response and pursuant to such process in connection with such hearings.

This stipulation shall not in anywise prejudice any conditions, positions or assertions or the status of any party subscribing thereto, and shall not in

anywise prejudice any of the existing rights of parties litigant, other than as stated herein.

The restrictions of this stipulation shall endure until such time as the Clerk of the within court has been advised by said Committee of the House of Representatives that the presence in the State of California of the respective persons to whom this stipulation is applicable is no longer required by said Committee.

That this stipulation shall not constitute a waiver of any of the rights of any of the parties represented by the undersigned to personally challenge the sufficiency or the validity of any of the process of the House of Representatives served upon them, if any there be.

It is further stipulated that the making of this stipulation shall not be or constitute an appearance either general or special for any of the clients of the undersigned counsel.

Dated this 17th day of November, 1950.

IRVING G. BISHOP, SYLVES-
TER HOFFMAN, PHILIP H.
ANGELL AND VERNE
DUSENBERY,
Attorneys-at-Law,

By /s/ IRVING G. BISHOP.

O'MELVENY & MYERS, and
RICHARD FITZPATRICK,
Attorneys-at-Law,

By /s/ RICHARD FITZPATRICK.

THOMAS P. MENZIES,
HAROLD L. WATT,
Attorneys-at-Law,

By /s/ THOMAS P. MENZIES.

ERNEST A. TOLIN,
United States Attorney,

By.....

FRANK G. MAKEPEACE,
Attorney-at-Law,

By /s/ FRANK G. MAKEPEACE.

ROBERT A. MOFFIT,
Attorney-at-Law,

By /s/ ROBERT A. MOFFIT. [20292]

W. I. GILBERT, JR.,
Attorney-at-Law,

By /s/ W. I. GILBERT, JR.

LYMAN B. SUTTER,
Attorney-at-Law,

By /s/ LYMAN B. SUTTER.

F. HENRY NeCASEK,
Attorney-at-Law,

By /s/ F. HENRY NeCASEK.

ALDEN AMES, JAMES E.
BURNS, CHARLES DAL
SOOY,

Attorneys-at-Law,

By /s/ CHARLES D. SOOY.

WESTOVER & SMITH,

Attorneys-at-Law,

By /s/ WYCKOFF WESTOVER.

CHARLES K. CHAPMAN,

Attorney-at-Law,

By /s/ CHARLES K. CHAPMAN.

RAYMOND TREMAINE,

Attorney-at-Law,

By /s/ RAYMOND TREMAINE.

LINNELL & SMITH,

Attorneys-at-Law,

By /s/ CHARLES T. SMITH. [20293]

The officers and board of directors of the Long Beach Federal Savings and Loan Association, whether being a party to the above-entitled litigation or not, acting through the general counsel of said Association, who represents that he is entitled to make the within stipulation on behalf of such officers and directors personally and also acting through T. A. Gregory, President, hereby consent and agree to the foregoing stipulation, and that neither said Association nor said directors and officers, nor any of them, will during the effective

period of the foregoing stipulation attempt any service of process in connection with any other or additional litigation than the within entitled consolidated matters, upon the persons upon whom waiver of service is made by the foregoing litigation.

CHARLES K. CHAPMAN,
Attorney-at-Law,

By /s/ CHARLES K. CHAPMAN.

T. A. GREGORY,

President of Long Beach Federal Savings and Loan
Association,

By /s/ T. A. GREGORY. [20294]

ORDER APPROVING STIPULATION

It Is Hereby Ordered, that the within stipulation is approved upon the following conditions:

That upon the issuance of any process in connection with the hearings mentioned in said stipulation, that said Sub-Committee, or counsel therefor, shall upon the issuance of any process pursuant to said stipulation, file with the Clerk of this Court the designation of the persons upon whom such process shall issue and shall file with the Clerk of said Court a designation of each such person so subjected to process upon their release of attendance within the State of California under such process.

Dated at Los Angeles, California, this 17th day of November, 1950.

/s/ PEIRSON M. HALL,

Judge of the United States
District Court. [20295]

In the United States District Court, Southern
District of California, Central Division

No. 5421-PH Civil

PAUL MALLONEE, et al.,

Plaintiffs,

vs.

JOHN H. FAHEY, et al.,

Defendants.

No. 5678-PH Civil

FEDERAL HOME LOAN BANK OF LOS AN-
GELES, a Body Corporate, et al.,

Plaintiffs,

vs.

FEDERAL HOME LOAN BANK OF PORT-
LAND, a Body Corporate, et al.,

Defendants.

Honorable Peirson M. Hall, Judge Presiding.

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

November 17, 1950

Appearances:

For Plaintiff and Shareholders Protective
Committee:

WESTOVER & SMITH,
1009 Pacific Southwest Building,
Los Angeles, California; by
WYCKOFF WESTOVER, ESQ.

For Defendant and Cross-Claimant Long
Beach Federal Savings & Loan Association:

CHARLES K. CHAPMAN, ESQ.,
17 Ocean Center Building,
Long Beach 2, California.

For Cross - Defendant Federal Home Loan
Bank of San Francisco:

BISHOP & HOFFMAN,
215 West Fifth Street,
Los Angeles 13, California; by
IRVING G. BISHOP, ESQ.

For Defendant and Cross-Claimant Federal
Home Loan Bank of Los Angeles:

O'MELVENY & MYERS,
900 Title Insurance Building,
Los Angeles 13, California; by
PIERCE WORKS, ESQ., and
PAUL FUSSELL, ESQ., and
RICHARD FITZPATRICK, ESQ.
1400 Chapman Building,
Los Angeles 14, California.

Appearing Specially for Defendant Ammann,
Individually, and as Conservator; and for
Defendant Fahey, Individually, and as
Commissioner:

ERNEST A. TOLIN,
United States Attorney,
Los Angeles 12, California; by
ARLINE MARTIN,
Assistant United States Attorney.

For Defendant and Cross-Claimant Wallis:

RAYMOND TREMAINE, ESQ.,

210 West Seventh Street,
Los Angeles 14, California.

For Title Service Company:

LYMAN B. SUTTER, ESQ.,

512 Jergins Trust Building,
Long Beach 2, California. [20298]

For First Federal Savings & Loan Association
of Wilmington:

W. I. GILBERT, JR., ESQ.,

939 Rowan Building,
Los Angeles 13, California.

For Land Title Insurance Company:

ROBERT A. MOFFITT, ESQ.,

11196 Long Beach Boulevard,
Lynwood, California.

For Home Indemnity Company of New York:

THOMAS P. MENZIES, ESQ.,

1017 Rowan Building,
Los Angeles 13, California.

For Harold Lee Newendorp, et al.:

LINELL & SMITH,

402 Jergins Trust Building,
Long Beach 2, California; by

CHARLES T. SMITH, ESQ.

For Roy E. Hegg, George Turner, et al.:

F. HENRY NeCASEK,
3233 East Anaheim Street,
Long Beach 4, California.

For Pioneer Investors Savings & Loan Association, et al.:

JAMES E. BURNS, ESQ.,
111 Sutter Street,
San Francisco, California; and
CHARLES DAL SOOY, ESQ.

Also Present:

HON. CHET HOLIFIELD,
House of Representatives.

HYMAN I. FISCHBACH,
Counsel for Special Sub-Committee.

RONALD WALKER,
Special Master in Chancery. [20299]

November 17, 1950—9:30 A.M.

The Court: May we have the appearances first. However, before we do that, I will state that yesterday, of the court's own motion, a minute order was entered in consolidated cases 5421 and 5678 as follows:

“Upon the suggestion of counsel for special sub-committee of the Committee on Executive Expenditures of the House of Representatives that the Committee desires to hold hearings in the state of California, and in connection therewith to subpoena

certain parties to the within action not residing in California who have not yet been served with process within the state of California, it is ordered that a special hearing in said actions be held on Friday, November 17, 1950, at 9:30 a.m., in courtroom No. 1, Federal Building, Los Angeles, California, and the clerk is to notify all appearing counsel in said actions directed that you be then and there present on behalf of the parties you represent in said actions."

I understand that the clerk sent a telegram, and will you indicate the parties to whom it was sent, Mr. Clerk?

The Clerk: To Westover & Smith——

Mr. Westover: Present, Westover & Smith by Wyckoff [20300] Westover.

The Court: As the name is called, will you indicate your appearance?

Mr. Westover: On behalf of the plaintiffs.

The Court: In behalf of the parties you represent.

Mr. Westover: Yes.

The Clerk: W. I. Gilbert, Jr.

Mr. Gilbert: Present, for First Federal Savings & Loan Association of Wilmington.

The Clerk: Charles K. Chapman.

Mr. Chapman: Present for Long Beach Federal.

The Clerk: Lyman B. Sutter.

Mr. Sutter: Present for Title Service Company.

The Clerk: Raymond Tremaine.

Mr. Tremaine: Present for Robert H. Wallis.

The Clerk: O'Melveny & Myers.

Mr. Works: Here for the parties whom we represent.

The Court: That is Pierce Works responding?

Mr. Works: Yes, your Honor.

The Clerk: Mr. FitzPatrick——

Mr. FitzPatrick: Here.

The Clerk: ——and Paul Fussell.

Mr. Fussell: Here.

The Clerk: Bishop & Hoffman, Verne Dusenbery and Philip N. Angell. [20301]

Mr. Bishop: Bishop & Hoffman, present by Irving G. Bishop, for the Federal Home Loan Bank of San Francisco.

The Court: Are you also appearing for Verne Dusenbery and Philip N. Angell?

Mr. Bishop: No, your Honor. I am appearing as counsel for the Bank.

The Court: Do you have complete authority to appear this morning regardless of what Mr. Dusenbery and Mr. Angell may think or do? They are not present.

Mr. Bishop: Your Honor, I have authority to act for the Bank.

Mr. Chapman: There are other clients, Mr. Bishop, who have made an appearance in the proceedings. Are you appearing for the directors and officers, also, or not?

The Court: Likewise Mr. Angell has appeared for them.

Mr. Bishop: Yes, as associate counsel. Mr. Dusenbery is general counsel. I was not asked specif-

ically by the court yesterday to inquire into the representation of the directors personally. As far as the Bank is concerned, I am here to represent the Bank.

The Court: Then you are not here representing the directors?

Mr. Bishop: I am as an attorney of record; yes.

The Court: In other words, the direction was that you be here on behalf of all of the parties whom you represent in [20302] the action?

Mr. Bishop: That is right.

The Court: So that you are now authorized to appear for all of the parties for whom you have heretofore appeared in this action?

Mr. Bishop: May I say, your Honor, that I practiced law for 22 years and my authority to appear in any court has never been questioned. I wouldn't be here if I didn't believe I had the authority.

The Court: I am not questioning your authority, Mr. Bishop, at all. What I am trying to do is to ascertain whether or not, after your appearance today, some statement might be made by Mr. Dusenbery or Mr. Angell or some members of the board of directors that your authority was limited.

Mr. Bishop: Your Honor, if there is any stipulation entered into today I am quite confident that before I sign it that I will also have written authority to do so, or telegraphic authority.

The Court: We will leave the matter stand that way. I wanted the matter disposed of this morning

without waiting for everybody to communicate with everybody else.

Mr. Bishop: I see no interference with that.

The Court: Very well.

The Clerk: Ernest A. Tolin, United States Attorney.

Miss Martin: Miss Martin for the so-called "official [20303] defendants."

The Court: That is, for all of the parties for whom the United States Attorney has heretofore appeared?

Miss Martin: That is correct.

The Court: Very well.

The Clerk: Mr. Fitting is not here?

Miss Martin: No. I am representing Mr. Tolin and Mr. Fitting this morning.

The Clerk: Robert A. Moffit.

Mr. Moffit: Ready for Land Title Insurance Company.

The Clerk: James E. Burns, Alden Ames, Albert A. Rosenshine and Charles Dal Sooy.

Mr. Burns: James E. Burns, appearing for the 10 northern California associations. Mr. Sooy, if your Honor please, I believe is going to attend, but Mr. Ames I believe communicated with your Honor and said he would not be here.

The Court: And Mr. Rosenshine——

Mr. Burns: Is deceased.

The Court: Mr. Dal Sooy is here?

Mr. Burns: I don't believe he is in the courtroom as yet, your Honor. I believe he is on his way.

The Court: You are authorized, however, to

appear for the parties for which this group of attorneys have heretofore appeared?

Mr. Burns: That is correct, your Honor. [20304]

The Court: Very well.

The Clerk: Linnell & Smith.

Mr. Smith: Charles T. Smith, for the parties we represent.

The Clerk: Thomas P. Menzies and Harold L. Watt.

Mr. Menzies: I represent the Home Indemnity Company of New York.

The Clerk: F. Henry NeCasek.

Mr. NeCasek: I represent Roy E. Hegg, George Turner and the Home Investment Company of Long Beach and others.

The Court: All of the parties for whom you have heretofore appeared of record in this litigation?

Mr. NeCasek: That is correct, your Honor.

The Clerk: Frank G. Makepeace. (No response.)

The Court: Let us see. Mr. Makepeace appeared as of counsel——

The Clerk: For Lillian Coggsell.

Mr. Chapman: He is one of the intervenors.

The Court: Lillian Coggsell, and there was another appearance for Lillian Coggsell, I think, filed by——

The Clerk: The United States Attorney, I think, your Honor.

The Court: I think it was Mr. Bishop and his group. Let me see the file.

(The documents referred to were passed to the court.) [20305]

The Court: Here is an answer of Archibald B. Young, Verne Dusenbery, Angell and Bishop. So that I understand that you are appearing for all the parties for whom you have heretofore appeared of record in this case.

Mr. Bishop: May I see the pleading, your Honor? I know of no representation of anybody by the name of Coggsell.

The Court: I will find some more of them here.

The Clerk: That wasn't Coggsell, your Honor.

The Court: Answer of Archibald Young to first supplemental complaint, etc.

Mr. Bishop: I think what you are looking for possibly, there is an appearance on file by General Rider for one of the directors in Salt Lake.

The Court: The answer to complaint of Lillian Coggsell has the names of Ernest A. Tolin and Paul Fitting, so that you are appearing for all parties for which the United States Attorney has heretofore appeared?

Miss Martin: That is so. I personally didn't know about the appearance, but we certainly are.

The Court: No, that is incorrect. That is an answer to complaint in intervention of Lillian Coggsell.

Mr. Bishop: That is what I couldn't understand, your Honor. We are not appearing for anybody by the name of Coggsell.

The Court: That is the United States Attorney. [20306]

Miss Martin: Did you actually find it there, that we have appeared?

The Court: No, you have not. That is the answer.

Does that other file have the Coggsell pleadings, or is this the only file that we have left, Mr. Clerk?

The Clerk: That is the only file we have, your Honor.

The Court: Here you are, Mr. Bishop. And there are several brown papers following that.

(The file referred to was passed to counsel.)

The Court: Well, it appears that Lillian Coggsell came in by some kind of complaint in intervention. However, the original files are in San Francisco in connection with an appeal, so I am unable to say what she has pending. Perhaps the makers of the rules on appeal anticipated that District Judges would have a compendious memory to be able to recall 22,000 pages of contents, but I cannot.

Does anybody know what Lillian Coggsell did or what her claim of intervention is?

Mr. Chapman: The papers served on me, your Honor, as attorney for Long Beach Federal, was a complaint in intervention because of the transaction she had had with a trust deed that she purchased or paid off or did something with to the conservator while he was in possession of our institution.

The Court: Where is Frank G. Makepeace?

Mr. Chapman: He is an attorney in Long Beach.

I think [20307] he has a one-man office and when he has matters out of town there is no one in the office but his secretary.

The Court: Does anyone happen to have a copy of Lillian Coggsell's complaint here?

Mr. Chapman: I don't believe we have them here. I can have them sent up from Long Beach in a short time, if you wish me to telephone for them.

The Court: No, I do not want to wait. In any event, that is all the parties that have been notified.

Mr. Fischbach, counsel for the special sub-committee of the Committee on Executive Expenditures of the House of Representatives, is here. Mr. Fischbach, it was at your suggestion yesterday that I made the minute order and sent the wire. Do you have a statement to make?

Mr. Fischbach: I do. Also I would like to enter my appearance as counsel.

The Court: Excuse me just a moment until we get through with this other matter.

Mr. Bishop: Yes, your Honor, I see it, but I do not get the significance of it. That is an answer for one of the directors.

The Court: But you are appearing for him?

Mr. Bishop: I am appearing for him.

The Court: Very well.

Mr. Fischbach: My name is Hyman I. Fischbach. My office [20308] address is 52 Wall Street, New York City.

I appear as special counsel, if the court please, for a sub-committee of the Committee on Executive

Expenditures of the House of Representatives. The sub-committee has entrusted to it a matter which involves the public interest, and it is obliged to report to the Congress on the administration of the Home Loan Bank Act in the Twelfth District.

The action under investigation by the committee has once before been the subject of a congressional investigation, and a report of which the court has doubtless been informed.

This committee is obliged to recommend such remedial administrative and legislative action as may be warranted by its findings.

It has come to the attention of the sub-committee during the course of the field investigation, which various members of the committee and its staff have been conducting, that there is need for the assistance of various persons who are not residents of the state of California but who have had official, and today do have official, participation in some of the activities under investigation.

Now the nature and complexities of this litigation before the court and the very fact that there are so many John Doe defendants who have been named as such, it makes it reasonably improbable for anybody to say whether or not many of the persons whose assistance the committee really needs in [20309] the state of California are or are not parties.

It has come to the attention of the committee that Board members, that is, members of the Home Loan Bank Board, as well as members of the board of directors of the Federal Home Loan Bank of San

Francisco, are meeting outside of the state of California to avoid being served with process in this action.

It has also come to the attention of the sub-committee that in times past individual members of the Home Loan Bank Board have come to California and have not been subjected to process in this litigation, notwithstanding their presence in the state of California.

Now I take it that it is basic law that any person who would attend a meeting of the sub-committee in the state of California under process of the House of Representatives would be immune from the service of civil process while in the state of California and while in attendance upon the needs of the committee.

Nevertheless, in order to facilitate the work of the committee, it would be very much appreciated if this court would use its good offices with counsel in the case to invite them to waive any attempt to serve process of this court upon any person who is not a resident of the state of California and who comes into the state at the behest of the committee to assist it in the work which has been committed to it. [20310] To that end I asked your Honor to convene a meeting of counsel——

The Court: Under subpoena by the committee?

Mr. Fischbach: Correct, sir.

The Court: To that end you what?

Mr. Fischbach: I have asked the court to convene these proceedings today and invite counsel who are officers of this court to waive the rights of their

respective clients to attempt to serve process in this case upon anybody subpoenaed by the committee in the state of California.

The Court: And who is not a resident or citizen of the state of California and regularly subject to its process out of this court.

Mr. Fischbach: That is correct.

The Court: Very well.

All of you have heard the statement made by Mr. Fischbach. Does anyone wish to be heard in connection with his request?

In connection with the matter of immunity of service of process, as everybody knows, it is Hornbook law that a person appearing under compulsion may not be served with process. Likewise, as everyone knows, a judge cannot adjudicate in advance. So the situation as it appears to me is this: The committee of Congress, lawfully constituted, desires to hold hearings within the state of California. In that connection [20311] they deem it necessary to subpoena and have present in the state of California concerning the investigation of the conduct in the Twelfth Federal Reserve District, the affairs committed to the Home Loan Bank Board of persons who may be officials and who are not, by virtue of their residence and citizenship, subject to the personal service of process of this court.

I take it that your request does not go to the extent of excusing them from service of process in their official capacity, such as may be served regardless of where their residence may be?

Mr. Fischbach: That is correct, sir.

The Court: In other words, there have been several rulings by this court, under what used to be I think Section 168, that this court has jurisdiction and power to serve its process anywhere in connection with property which is within this district.

Mr. Fischbach: I might say, your Honor, that among the persons whose presence in the state of California is desired—and this is by no means an exclusive list—are Messrs. Divers, Adams and La Roque, who are the members of the present Home Loan Bank Board. Mr. Dyke, who was formerly a member of the Board, Mr. Husband, who is an official of the Federal Savings & Loan Insurance Corporation. We also desire the presence of Mr. Fahey, who formerly was [20312] administrator and formerly a member of the original statutory Board. Mr. Siegel, who formerly was a member of the civil division, I believe, in the office of the Attorney General, an Assistant Attorney General, Mr. Twohy, Mr. Keller; and the committee might also require the presence of Moe Silverman. Moe Silverman is an attorney who is a member of the legal staff of the Home Loan Bank Board; Mr. McKenna, Mr. MacGuineas, who is an assistant to the Attorney General; Mr. Heisler and Mr. Ammann, whose activities are the subject of scrutiny by the court here in an accounting procedure; Mr. Bogardus, who is the supervisor in charge of the Portland Branch of the San Francisco Bank.

Now because of the naming of so many John Does——

The Court: Those are all people connected not immediately with the San Francisco Bank. What about the directors of the San Francisco Bank who are citizens of other states than the state of California?

Mr. Fischbach: If your Honor please, I have a list of those persons, past and present directors of the San Francisco Bank.

The Court: I wonder if you might designate them so that the parties may know who you presently have in mind.

Mr. Fischbach: Yes, I will be glad to submit that to the clerk for the record. Or I could read them off now.

The Court: Yes, let us read them into the record. [20313]

Mr. Fischbach: Ben A. Perham, Fred J. Bradshaw, M. L. Carrier, I. W. Dinsmore, Douglas H. Driggs, R. J. Fremou, L. H. Hoffman, Guy E. Jaques, C. W. Leaphart, L. C. Wetzel, J. H. Andrews, C. N. Bloomfield, Percy C. Bulen, R. Floyd Hewitt, F. M. Donahoe, Joseph E. Swindlehurst, Thomas T. Taylor, W. D. Hopping, Worth D. Wright, Paul Bartling, W. O. McCaw, and J. W. Maxwell.

The Court: It would seem to me that the Committee on Executive Expenditures of the House of Representatives have the right to conduct an investigation as outlined by Mr. Fischbach, the counsel for the sub-committee, and that while this court has no power to issue any process at this time, to make a ruling or holding in advance concerning any

immunity from service of process, it occurred to me that by getting all of the counsel together for all of the parties and having Mr. Fischbach's statement that you might give consideration to the execution of the stipulation which he suggests.

Now does anybody wish to be heard on that?

Miss Martin: May I ask a question first, your Honor?

The Court: Certainly.

Miss Martin: This waiver, which you are suggesting that might be made, is it your suggestion that it is a waiver only as to persons now named in this action whether served or not, now named as parties? Is it to be limited to that?

The Court: Apparently not, according to Mr. Fischbach's [20314] request. He has indicated that there are many John Does, that that if Mr. Siegel or Mr. Twohy or Mr. Keller or Mr. Moe Silverman happens to turn up with the name John Doe to some of those services, he wants the immunity granted to him. As I understand it, it is not only the designated parties but any other party who is not a citizen and resident of the state of California and not subject to the service of personal process of this court within this jurisdiction who may be subpoenaed to come within the state of California in connection with the congressional investigation indicated to be conducted by Mr. Fischbach by that sub-committee, that they shall be immune from service of process in this action by any of the parties to the action, that is, immunity from the service of personal process.

Miss Martin: In other words, for instance on Mr. Siegel, limiting it merely to service of process in this action on that party. In other words, there are a lot of people here and the United States Attorney might want to serve them with process for any number of reasons outside of this action.

The Court: Of course. If somebody comes out here and robs a bank and the United States Attorney wants to indict him, I certainly contemplate that the stipulation shall be only within the framework of these consolidated actions.

Is that correct, Mr. Fischbach?

Mr. Fischbach: That is correct, your Honor.

I stated, I think it is basic law that anybody who came into the state of California pursuant to the process of the House of Representatives and to attend before a committee of the Congress would be immune from the service of process in any event, but what I am endeavoring to do is to get the counsel in this case voluntarily to waive the right to attempt to make service.

The Court: In so far as any process in this case is concerned.

Mr. Fischbach: That is correct.

The Court: I mean, if somebody else has some other kind of a cause of action, I am not concerned with it in this case.

Mr. Fischbach: That is right.

The Court: And you are not asking that they be granted general immunity?

Mr. Fischbach: That is correct.

The Court: Very well. Is that clear, Miss Martin?

Miss Martin: Yes. Thank you.

The Court: Mr. Gilbert?

Mr. Gilbert: If the court please, on behalf of my client, I waive such right to attempt to serve process and request, in view of the possibility that there might be other persons subpoenaed to testify in addition to those already named, I would suggest that it be considered that some plan be devised to keep counsel advised from time to time what persons actually are under subpoena so that there can be [20316] no misunderstanding or confusion in that regard.

The Court: As part of your request, Mr. Fischbach, would you consider that there be filed with the clerk as the subpoenas are issued the list of parties, and that the stipulation would extend to those parties?

Mr. Fischbach: I would be very glad to do that, your Honor. And I would also be glad to notify the clerk when the presence of any person on the list is no longer required by the committee.

The Court: Giving them time to get out of town.

Mr. Fischbach: Yes.

Mr. Westover: On behalf of the plaintiff, your Honor, in Case No. 5421, we of course would be happy to waive the rights to serve witnesses who are here in California in response to a subpoena, whether congressional subpoena or court subpoena or otherwise. We feel that they would be immune anyway.

We would also like to express our willingness and desire to cooperate fully and assist the committee in any way we can do so properly.

I do feel this, that it should be made clear that the status of parties as they now exist have not been changed or abridged or modified in any way, shape or manner by my willingness to waive on behalf of my client the right to service while they are responding to the subpoena. [20317]

The Court: In other words, you do not waive anything else?

Mr. Westover: That is right. We want to limit it to that.

Mr. Fischbach: If your Honor please, I would like to make it clear to the court and clear to counsel that there is nothing in the request which should in anywise be deemed to alter the existing status of the litigation in any way.

The Court: Or the rights of the parties?

Mr. Fischbach: Correct.

The Court: Very well.

Mr. Works: If the court please, we will make the same waiver on behalf of the clients whom we represent, it being understood along the lines just discussed that the waiver is without prejudice to any contentions now made in the actions, including the contention that there have been general appearances already, as far as certain defendants are concerned.

The Court: I understand that Mr. Westover has contended that there has been general appearances.

Mr. Westover: That is right, your Honor. In fact, I think some of those points are being brought out on appeal now, and we wouldn't want to prejudice our position that we have already taken or as expressed before other courts.

Mr. Works: We are expressing the same thought in a different form, your Honor. [20318]

The Court: You are not asked, and I understand that you do not contemplate, a waiver of any service which has been made in the past or appearances which have been made in the past.

Mr. Works: Or contentions with regard to that.

The Court: Or contentions with regard to that.

The Court: It is only the waiver of the right to serve process in the future in this case upon any person not subject to service within the state of California who is brought here under a subpoena from the congressional committee.

Mr. Works: That is right.

The Court: Now I understand in that connection that you are also waiving the right to challenge the validity of a subpoena.

Mr. Works: Yes.

The Court: I have in mind the recent case in the Supreme Court where they held a congressional committee—what is the name of it?

Mr. Fischbach: The Christophel case.

The Court: The Christophel case. In other words, the stipulation does not comprehend that it shall be a legal, valid subpoena. In other words, the subpoena if issued and served will be valid on its face. Is that your understanding?

Mr. Works: Yes.

The Court: Is that your understanding, Mr. Gilbert? [20319]

Mr. Westover: That is agreeable.

The Court: What happened to Mr. Gilbert?

Mr. Gilbert: Pardon me.

The Court: Is that your understanding as well?

Mr. Gilbert: Yes.

The Court: Very well.

Mr. Westover: We do contemplate that there will be some notice with the clerk or otherwise so we will know how long the witnesses have such immunity.

The Court: Yes. You heard Mr. Fischbach's statement as to that.

Mr. Westover: That is right.

Mr. Chapman: Your Honor, the Long Beach Association has been welcoming any inquiry into these seizures, judicial, legislative or otherwise, and we certainly would do nothing to impede or obstruct the congressional process, nor to question the validity of congressional subpoenas. On behalf of the Association I am waiving any attempt to serve process.

The Court: On behalf of all parties for whom you have heretofore appeared?

Mr. Chapman: Yes. I think the Association has been only represented by one attorney for these four years.

The Court: I think Mr. Gregory is here personally in this litigation, is he not, someplace?

Mr. Chapman: I don't believe I have appeared for him personally, [20320] your Honor. I think he is a defendant. But I will waive for all my clients. There is no restriction on my waiver.

The Court: And were not all the officers and

directors of the Association served by somebody here?

Mr. Chapman: They are parties and they have been served, but I don't believe I am appearing for them personally.

The Court: Who appears for them?

Mr. Chapman: Mr. Tremaine, I think. He appeared for Mr. Wallace, attorney for the Association at the time it was seized, and I think he also appeared for the officers and directors.

The Court: Anyhow, whatever the record shows.

Mr. Chapman: That is right. But I am certainly making no restriction on my waiver.

I do have a suggestion to offer. We have had some experience with stipulations in the past in this matter. I think the court might well consider some sort of an order to its clerk in connection with the issuance of additional process. My understanding is that most of the process heretofore issued, I think all of it, has been served and certainly anyone seeking new process would have to apply to the clerk for that process. I think with the array of counsel we have here, we have the majority or perhaps with very minor exceptions, everybody present. But it would be most unfortunate [20324] to have all of us waive, as we are now doing—and I hope all other counsel will too—and find that there has been someone overlooked who thought they weren't bound by that waiver.

We have had experiences on occasions in the past when we thought we had everybody in agreement and somebody has been overlooked. I think it would

be entirely proper for an order of a temporary nature, just during the pendency of these committee hearings, if they are held in California, that the clerk notify all counsel before issuing any further process if anyone applies.

The Court: I rather doubt if the court has that power. It seems to me that the process is a matter of right. I think, however, that the court would have the power to direct the clerk not to issue any process in any of these actions for any party not appearing here this morning.

Mr. Chapman: That would cover the situation.

The Court: Unless and until the application to the court is made.

Mr. Chapman: Regardless of whether an order is made, I am glad to cooperate with any congressional investigation and waive whatever is necessary. I don't think there is any right to serve a witness who is immune under subpoena.

The Court: In view of the Christophel case, the matter may be challenged apparently as to the validity of the composition [20322] of the congressional committee, or some possible irregularity in the issuance of a subpoena or something like that, and what is sought here by this stipulation is to eliminate those things so that the people who may be subpoenaed here may personally come to the state of California without apprehension as to their personal liability and without feeling that they may have to go through several years of litigation before either the validity of the setup of the committee is established or the validity of the issuance

of a subpoena or some technicality upon which the question may turn.

Mr. Chapman: They need have no such apprehensions as to the Long Beach Association.

The Court: Very well.

Mr. Tremaine?

Mr. Tremaine: I concur, your Honor, particularly as expressed by Mr. Works.

Your Honor said something about representing Mr. Gregory. I don't think I am appearing for Mr. Gregory.

The Court: Mr. Gregory is here. Who is your counsel in this case?

Mr. Gregory: Your Honor please, the case where I was named a defendant was remanded to the Superior Court. Mr. Tremaine appeared for us there, but at the present time he is restrained.

The Court: At the present time you are not personally [20323] served with process in any of the various third parties, cross-complaints, interventions?

Mr. Gregory: That is right.

The Court: Nor are the directors of the Association?

Mr. Gregory: Nor are the directors of the Association.

The Court: Very well.

Mr. Tremaine: I believe, your Honor, the case he referred to was remanded to the Superior Court, so I don't believe there is any appearance there.

The Court: In any event, you join in the waiver as heretofore collectively expressed?

Mr. Tremaine: I do, your Honor.

The Court: On behalf of the parties you appear for of record in this case?

Mr. Tremaine: I do.

The Court: Very well.

Mr. Sutter: On behalf of Title Service Company, I will join in the waiver. Fortunately I can say I represent only Title Service Company.

The Court: Mr. Bishop?

Mr. Bishop: Your Honor, I don't believe that any waiver or stipulation can add or detract from the power of Congress to subpoena anybody. We cannot give any greater immunity than is already given by law. And so that my remarks are not misunderstood, there is no desire on my part to frustrate Congress [20324] or this committee, or this court.

I am willing to state with every reservation in the world that I cannot speak for any individual member of the board of directors or officers of the Federal Home Loan Bank of San Francisco about his personal right to resist any subpoena or to take any step he wants in connection with the congressional hearing. That is his personal right.

The Court: Mr. Bishop, if anybody has any notion that I am now giving consideration to whether or not a subpoena is validly issued or whatever a person's rights may be in connection with or in resistance to the subpoena issued by a congressional committee, they are under a complete misapprehension. The suggestion does not concern

that at all. It only concerns the service of process in this litigation.

Mr. Bishop: Yes, your Honor, and that is the other point I am going to make.

I don't know how a stipulation by counsel present this morning will serve that purpose either—and I am not talking just about the absence of counsel for my client—but there are counsel that are absent that aren't going to be bound by it.

The Court: Who?

Mr. Bishop: I mean, if it is for all parties, and you always have to have all parties—for instance, Mr. Makepeace. I tried to look in that file. There is a pleading [20325] file by General Rider in Salt Lake on behalf of one of the people Mr. Fischbach mentioned, Mr. Taylor, who is now a director of the Bank.

Again with every reservation in the world, I will state, and I want the right to state, that we will not serve any process on anybody.

The Court: Do you join in the stipulation, the proposed stipulation?

Mr. Bishop: When I am sure that I know what it is. Everybody is trying something on it. Is it going to be an order, is it going to be a written stipulation, or what?

The Court: What do you understand the proposal to be now, Mr. Bishop?

Mr. Bishop: I understand the proposal to be that we counsel present indicate or stipulate to this court that we will not serve any process in connection with this litigation upon anyone subpoenaed

here by the congressional committee who is not a resident of the state of California. Is that correct?

The Court: That is, not a resident or citizen of the state of California.

Mr. Bishop: That is correct.

The Court: And not subject to process out of this court.

Mr. Bishop: That is correct.

The Court: Without waiving anybody's contentions of [20326] valid service heretofore made or anything else that has gone in the past.

Mr. Bishop: Without waiving anything.

The Court: Not waiving anything. When you join in the stipulation you waive the right to attack the validity of the subpoena issued by the committee and the validity of the committee and any challenge to it in so far as it is concerned in this litigation.

Mr. Bishop: That is what I mean, your Honor. I can't do that for an individual officer or director of our bank. No man can do that. That is his constitutional right. I would have to ask each one of them to consult their own counsel to do that.

The Court: You are appearing for them as counsel.

Mr. Bishop: What is that?

The Court: You are appearing for them as counsel.

Mr. Bishop: Yes, your Honor.

The Court: In this litigation.

Mr. Bishop: Yes.

And if your Honor will please bear with me, you

asked my authority this morning, and in order to waive such a right for any one of our board of directors or officers I cannot be compelled to make a stipulation.

The Court: Nobody can be compelled to make any stipulation. [20327]

Mr. Bishop: Well, then, if I have to go that far, then I will have to get authority from each individual one, and I didn't think that that would become necessary. But I thought it was understood, and I can't do it, and I wouldn't, for any individual waive his right because to this day I have tried several times and several ways to find some real resolution of authority about this investigation.

The Court: Mr. Bishop, you appear as counsel for the Bank.

Mr. Bishop: Yes, sir.

The Court: The Bank is composed of directors who have residence within the state of California and—how many states are there composing the Bank?

Mr. Bishop: The twelve western states.

The Court: The directors variously reside in those twelve western states. Since this litigation has begun, it has just been brought to my attention, and it had never occurred to me, that the board of directors of the Bank have been holding their meetings in other states. Is that correct?

Mr. Bishop: Yes, sir.

The Court: And for why?

Mr. Bishop: Is there anything unlawful about it?

The Court: Nothing.

Mr. Bishop: Or illegal?

The Court: Nothing. The headquarters of the Bank is San [20328] Francisco. I should think that once in a number of years, or however long this has been pending, they would feel free to hold a meeting in their own headquarters. Could it be that they are afraid of being served with process if they come within the state of California and a possible personal liability?

Mr. Bishop: I can't speak as to what their mental attitude is, whether they are afraid or not. That is entirely up to these men themselves.

The Court: Whether or not they are or are not afraid, could it be possible that they are acting upon advice of some counsel for the Bank, that if they do they might be served with process in this case personally?

Mr. Bishop: Maybe, and maybe not counsel for the Bank, your Honor.

The Court: There is one other thing that I have in mind in connection with this, and I hope that I am not extrajudicia, in that connection, but it has been represented to me repeatedly and most vehemently upon occasions that the business of the Bank and the business of the Home Loan Bank Board are vested with an exceedingly great public interest, and that it was necessary for them to have meetings throughout and at various portions of the United States. It occurs to me that possibly they may have necessity, in connection with their official travel, to be in this district. But nobody

has suggested [20329] to me the necessity for them coming here. Had they done so, I would have called counsel together and asked for a stipulation such as I am asking for this morning, because while the parties are entitled to litigate, I have done everything that I can to see that the public business of the banks and the litigants has not been stopped.

Mr. Bishop: I don't know what more I can say, your Honor.

The Court: Your answer is no, then, you do not stipulate?

Mr. Bishop: I go along as far as the Bank is concerned about serving papers, but as to the rest of it, about waiving any right about subpoenas, I cannot do it, your Honor, or any right to contest the validity. That is for the individual members themselves.

The Court: Let us put it this way, Mr. Bishop: Suppose that—who did you say this fellow from Salt Lake was?

Mr. Bishop: General Rider. He is an attorney. He represents Tom Taylor.

The Court: Suppose Tom Taylor came here under the services of a subpoena, whereupon Mr. Westover served him, and Mr. Chapman and Mr. NeCasek and Mr. Sutter and Mr. Gilbert and O'Melveny & Myers served him with process in this case and said, "Now you are hooked. We have you served personally. You have to come down here and fight it." [20330]

He would say, "Well, I have a congressional subpoena."

Whereupon they would say, "Yes, I know, but we have a right to challenge, No. 1, the validity of the composition of the committee; No. 2, the validity of the issuance and execution of the subpoena; No. 3, the service of the subpoena, so you are actually not here under compulsion."

Do you feel that you are not justified in waiving for the directors for whom you appear?

Mr. Bishop: No, because I don't think the stipulation can be of any efficacy. It doesn't bind all the parties to the action, and other people who file interventions tomorrow and serve process in addition——

The Court: Yes, they can.

Mr. Bishop: ——and they aren't even heard of. They are unknown.

The Court: Yes.

Mr. Bishop: Your Honor, to me—I am saying this as my own conscience—I don't understand.

The Court: Mr. Burns?

Mr. Burns: I might say, your Honor, that Mr. Dal Sooy is in court now.

The Court: Very well. Which one of you wishes to make the statement?

Mr. Burns: I will make a preliminary one and Mr. Dal Sooy maybe would like to supplement it. [20331]

In view of your Honor's injunction, I don't know two things, whether or not we can enter into any stipulation or take any action in this matter and, secondly, in view of the nature and scope of that injunction, certainly we can never serve any process

on anyone who came into the state of California.

The Court: I think that is with relation to the action in Northern California. Your clients are, however, parties to this action.

Mr. Burns: Yes, but we are enjoined from doing anything further but being parties defendant to this action, if your Honor please.

The Court: And that is far as the request could go, or as far as your power could go, is in this consolidated action.

Mr. Burns: That is correct, your Honor. But we are not seeking any relief here.

Not to prolong these proceedings, we will enter no objection and will waive our rights and so stipulate.

The Court: Very well.

Mr. Dal Sooy?

Mr. Dal Sooy: I have nothing to add to that, your Honor.

The Court: Ernest A. Tolin.

Miss Martin: If I am correct, your Honor, the defendants [20332] whom we represent are the recipients of the goodwill of this stipulation, if any. If the court were in a position to make some order along the lines of the stipulation, we would make no objection.

The Court: The stipulation will have to be approved by the court.

Miss Martin: Your Honor has already said you do not feel you have jurisdiction to enter any order at this stage of the proceedings. Perhaps you might think you would have if after some of these persons

had been served with a subpoena. I don't know. In any event, I am instructed to say that we cannot enter into any stipulation. However, we do not object to an order to this effect, and we will make no objection to it if your Honor can enter an order.

The Court: I am satisfied that I cannot make an order adjudicating in advance any immunity at all. It is either a stipulation which will have the approval of the court, as I see it, or the matter will just have to take its course.

The position of the Government is that you decline to stipulate, then?

Miss Martin: That is correct. However, as I have said, we seem to be, for our defendants, the recipients of whatever good can come from this stipulation.

The Court: You are saying "no, but" now. Can you say "no" or "yes" without a "but"? [20333]

Miss Martin: These people are waiving their right to serve any of the defendants whom we represent who have not previously been served in this action.

The Court: I do not know who will be subpoenaed here by the congressional committee. I do not know whether or not you can have any process or will have any process, and original process, to serve.

Miss Martin: I do not either, your Honor. I am merely suggesting that it seems to me that it was not requisite to the aims of the congressional committee for the Government to enter into this stipulation in the stage of the suit now.

The Court: It would seem to me that it would be a requisite, or that there would be no stipulation.

Mr. Fischbach?

Mr. Fischbach: Your Honor please, we certainly desire the acquiescence of the Government to this proposal, and I think that the record here ought to reflect our view in that respect. If the Government intends to harass anybody who comes to this jurisdiction, why we might just as well know about it before being subjected to the onus of endeavoring to protect anybody we bring here under process. It is just as clear as that. And if the Government desires to enter any opposition to this proposal, why that is perfectly all right. We will deal with that as we have to.

The Court: Have you completed your statement, Miss [20334] Martin?

Miss Martin: I think I should say this——

The Court: May I ask you this, Miss Martin: You are acting under instructions from Washington?

Miss Martin: Yes, from Mr. MacGuineas.

The Court: From Mr. MacGuineas?

Miss Martin: Yes. We have no objection but we cannot stipulate.

However, if I follow Mr. Fischbach's remarks, in so far as I know there is no one in this suit whom the Government has been attempting to serve.

Mr. Fischbach: Then why object?

The Court: Why not consent?

Miss Martin: Why do you need a stipulation?

Mr. Bishop: I think the record shows what he said.

The Court: He needs a stipulation because the committee has a right to have hearings, they desire to subpoena people, the people whom they desire to subpoena probably desire to cooperate. In other words, they are confronted, on the one hand, with a possible contempt citation from Congress and, on the other, if they obey, being personally served with some kind of process in this very complex litigation which might ultimately make them liable to a personal judgment.

Miss Martin: I may not follow this, your Honor, but it seems to me that we are representing the particular defendants [20335] who have to worry about being served by the other parties.

The Court: That is up to you.

Miss Martin: Well, there you are. How can anybody stipulate to that?

The Court: I do not know who they are going to subpoena.

Miss Martin: Well, those are my instructions.

The Court: Very well.

Mr. Menzies?

Mr. Menzies: Your Honor, I will have to communicate with the home office, but I don't anticipate any objection to it.

The Court: How soon can you communicate with them?

Mr. Menzies: I can get an air mail letter off to them today. They will get it Monday, and I imagine

probably I would hear by Wednesday or Thursday.

The Court: The matter should be disposed of today because I understand the committee desires to issue the subpoenas and get under way in the hearings.

Is that correct, Mr. Fischbach?

Mr. Fischbach: That is correct, your Honor.

And I might state, for the benefit of all counsel assembled here and the information of the court, that the business of the committee next week in Washington will be very seriously affected by what takes place here this morning. In other words, what takes place here this morning is largely [20336] going to govern the activity of the committee in the ensuing week or ten days.

Miss Martin: I should like to ask, as to the official defendants whom we represent, the Home Loan Bank Board and all, if it isn't possible for the committee to interview them in Washington.

Mr. Fischbach: It is possible. So is it possible that we may require them here.

The Court: How soon can you get an answer, Mr. Menzies?

Mr. Menzies: Your Honor, it is practically 2:00 o'clock in New York.

The Court: They are back from lunch by now, then.

Mr. Menzies: I am afraid that you don't know Friday afternoon and the insurance men at lunch. They usually go to lunch and then it is a long week end from there on. Having spent a good many week ends in New York, I know what happens.

Mr. Fischbach: I might say, off the record, that what the gentleman is stating is possibly correct.

Mr. Menzies: I can assure you, sir, it is. I have been there and suffered from it.

The Court: Would it be possible for you to attempt to get some answer?

Mr. Menzies: Yes, sir. I can attempt.

The Court: You can go in and use the telephone in my secretary's office and charge it to your number. [20337]

Mr. Menzies: I will do better than that; I will charge it to the New York number.

The Court: Very well. You may step into my secretary's office.

Linnell & Smith?

Mr. Smith: Your Honor please, we are willing to join in the stipulation as variously stated.

The Court: Mr. NeCasek?

Mr. NeCasek: Your Honor please, I am willing to join in the stipulation. The only thing that comes into my mind, some of these witnesses being subpoenaed out here may enjoy the climate and will stay here for a long period of time, and I would just like to inquire how long the immunity will last after they testify.

The Court: They are under the subpoena, and Mr. Fischbach stated that he would file with the clerk of the court here the date of their release from the subpoena.

Mr. NeCasek: The hearing may be continued from month to month.

The Court: Well, in the event that anybody

feels aggrieved as to the stipulation, that can be taken up. We had one once before and somebody felt aggrieved and sought relief from it.

Mr. NeCasek: That was the only thought I had in mind. I am willing to agree to the [20338] stipulation.

The Court: I do not think anybody could stipulate to the length of time, but if anyone wants to be relieved from the stipulation at any time he has his remedy.

Mr. Fischbach: May I state, your Honor, that the committee will proceed with this matter with all dispatch.

The Court: Very well.

Mr. NeCasek: Regardless of whether or not the Government stipulates or whether the San Francisco Bank does, I will so stipulate and be bound by it.

The Court: I guess we have heard from all counsel here. We will have a few moments recess, and perhaps Miss Martin and Mr. Bishop would like to have a consultation, either with their clients or somebody, because apparently they are the only two not in accord with it. I would not feel that there was a stipulation unless it was signed by each of them.

Miss Martin: I will be glad to call Washington, if your Honor please, and report as soon as possible.

In addition to that there is a little criminal matter here, which I would like to ask that we take care of before your Honor recesses.

The Court: I am not going to recess; it will just be the morning recess.

Miss Martin: Then may we come back on the calendar so that I may take up another matter?

The Court: Mr. Bishop, how long will you want? Twenty [20339] minutes?

Mr. Bishop: Your Honor, I think this should be of record so that there is no uncertainty about it and so that there is no question about my own personal views in the matter, and if the time can be taken so that I can see what the proposed stipulation really says of record I will be glad to call general counsel and see if he has other suggestions or desires.

The Court: Do you have a proposed form of stipulation with you, Mr. Fischbach?

Mr. Fischbach: No, I have no proposed form of stipulation, but I should think it is perfectly clear, or it should be perfectly clear to Mr. Bishop and everybody else, that there is a great deal of benefit that flows to his client, whether his client is the San Francisco Bank or the directors of the San Francisco Bank, past or present or future, at least future as to the extent of the business of the committee in the state of California. And it is rather surprising, and I think somewhat significant, that the Bank as represented by counsel in this matter seek not to avail themselves of a situation as is before the court. However, Mr. Bishop's views on that I think could be clarified if I might have the permission of the court to do so and I would like to talk with him for five minutes during the recess.

The Court: This matter will be in recess, say, for 30 minutes. [20340]

(Short recess.)

The Court: This matter was recessed in order to give Miss Martin an opportunity for contemplation, deliberation or consultation with Mr. Bishop.

Miss Martin?

Miss Martin: I didn't devote all my time to consultation with Mr. Bishop. It was my understanding that your Honor wanted me to again check with Mr. MacGuineas on this matter.

The Court: Yes.

Miss Martin: And that is what I did.

I had some little difficulty getting him on the phone. That is why I was delayed. But I relayed to him what has gone on in court this morning, and my previous statement of the Government's position, and he advised me that that is correct and that I am to say that the Government feels—not the Government feels—the Government cannot stipulate as requested here. The Government has no interest in this suit in the matter and sees no reason to stipulate. We do not object to the plaintiffs waiving anything they care to waive, and if that serves the purpose that will be fine.

The Court: Thank you.

Mr. Bishop?

Mr. Bishop: I checked the record with Mr. Wahlberg and following up all statements previously made, and not believing that it would be of any valid force or effect—— [20341]

The Court: I did not hear you. Not believing what?

Mr. Bishop: That the stipulation will be of any valid force or effect as far as conferring any immunity towards anyone, I am willing to state so that there is no possible accusation that there is obstruction on the part of our client in this matter from any source.

If I understand the stipulation, this is what I believe it to be, and I am offering, and will so stipulate on behalf of the clients that I represent. We are willing to stipulate that we will not serve or attempt to serve any process in connection with the matters involved within the framework of these consolidated actions on any person not a resident of the state of California who is under subpoena to appear before the congressional committee in California, and that in so far as this stipulation is concerned, we cannot and will not attempt to be relieved from the stipulation by any attack on the validity of any subpoena served by the committee on any person not a resident of California. But this stipulation shall not constitute a waiver for an appearance by our clients, special or general or in any respect, nor shall it be a waiver of any right of any of our clients to personally challenge the sufficiency in any respect of any congressional subpoena served on them in any other respect than within the confines of this stipulation.

I want my stipulation to be further followed up by quoting, as I understand it from the record, the court's own [20342] language:

“If anybody has any notion that I am now giving consideration to whether or not a subpoena is validly issued or whatever a person’s rights may be in connection with or in resistance to a subpoena issued by a congressional committee, they are under a complete misapprehension. The suggestion does not concern that at all. It only concerns the service of process in this litigation.”

The Court: Mr. Fischbach?

Mr. Fischbach: I think Mr. Bishop’s position is perfectly satisfactory to the committee.

The Court: Very well.

Mr. Fischbach: I understand from the statement that he will refrain and his clients will refrain from initiating or attempting the service of process upon anybody called by the committee.

The Court: It seems to me as though everybody has agreed except the official defendants, represented by the United States Attorney, acting under instructions from Mr. MacGuineas, who is an assistant or special assistant or attorney in the Department of Justice in Washington.

I think that perhaps while all counsel are here and available, in order that there may be no misunderstanding in [20343] view of the ideas that have been developed here, that it would be best to form the stipulation and have everybody sign it and have me approve it. I am willing to take whatever of my time is necessary. I suppose somebody ought to dictate it. Do you have, Mr. Fischbach, a formalized stipulation?

Mr. Fischbach: Your Honor please, that which I have prepared is in a different form than in a stipulation. I would be glad, however, to undertake now to dictate a stipulation, if I could have the assistance of counsel in formulating it.

The Court: Suppose I just declare a recess here. I see the young lady from Mr. Chapman's office is available.

Mr. Menzies: Your Honor?

The Court: Yes, Mr. Menzies. Pardon me. You were to call New York.

Mr. Menzies: I was unable to get our chief counsel, your Honor. He had gone for the week end. I told your Honor, while we were in there on the telephone, that I would recommend that they join in the stipulation. We are not mad at anybody, and we are not trying to serve process on anybody that I know of. I know not what is in Mr. Laughlin's mind. I will be unable to get him until Monday at the earliest.

The Court: Well, I think perhaps we can proceed with the formulation of the stipulation.

Mr. Menzies: I have no objection to the wording of it. [20344] These gentlemen, who seem to think that there is something that might materially affect their rights, if they are satisfied with it I have no quarrel with their ideas.

The Court: If counsel could all remain here I will just declare a recess and you can start dictating it and have the benefit of my typewriter and the benefit of my secretary's office.

Mr. Menzies: May I be excused then, your Honor?

The Court: I think perhaps everybody who is here ought to remain here until it is formulated and written so that there will be no misunderstanding.

Mr. Menzies: I am sure I have nothing to add or subtract to that stipulation whatever, as long as it is within the outlines as set forth here.

The Court: Will you be available at your office this afternoon?

Mr. Menzies: For a short period of time only.

The Court: It looks to me like you acquired a "New York habit."

Mr. Menzies: No, your Honor. I will tell you very frankly, the pheasant season opens in the morning, and if it hadn't been for the clerk's telegram I wouldn't have been here today.

The Court: May I suggest this, then, that before you leave your office for the day you communicate here so that we [20345] can see if the stipulation is ready. It should not be long.

Mr. Menzies: Certainly.

The Court: Is there any counsel who object to remaining here while we endeavor to formulate this stipulation?

Mr. Burns: If your Honor please, I don't think we would have any quarrel with any language suggested by other counsel. I do have another appointment. I could be available later this afternoon, however.

The Court: In view of your plain and simple

and very understandable statement that you waive and consent, it seems to me that that perhaps might be all right. Could you telephone here later?

Mr. Burns: Yes, your Honor.

The Court: When will you be available, Mr. Burns?

Mr. Burns: Anytime after 1:30.

The Court: Anytime after 1:30?

Mr. Burns: That is right.

The Court: Would you be available in the meantime on the telephone?

Mr. Burns: Yes, sir.

The Court: Very well. If you will leave your telephone number with somebody here so they can reach you.

Is there anybody else who cannot wait here to get this done?

Mr. Gregory: If the court please, I was asked during the [20346] recess if I would give the court assurances that the officers and directors of the Long Beach Federal would not initiate any service on the folks who might be required to come to the state. I want to so assure the court now.

The Court: You are not a personal party to this proceeding, are you?

Mr. Gregory: No, if the court please, I am not. I do not know why the assurance might be required, but if it is I will give it.

Mr. Chapman: I want to join in that. I am attorney for the Association.

The Court: Perhaps at the bottom of this stipulation you can put a separate paragraph and then

sign it, something to the effect, not being personal parties to the proceedings, we nevertheless agree, etc.

Mr. Chapman: That can be done.

Mr. Fischbach: I think that would be helpful.

The Court: Very well.

Miss Martin: Your Honor, there is one little piece of unfinished business here that I would like to bring up.

At the time of the hearing on the special master's petition for fees in connection with the discovery proceedings, your Honor asked Mr. Fitting a question as to whether or not the Government would consent that the discovery proceedings proceed without the presence of the special master in accordance [20347] with the original demands for the inspection by the plaintiffs, and he asked for instructions on that from Washington.

The Court: I had understood before the hearing concluded that they declined.

Miss Martin: Well, he was under the impression that your Honor wanted some sort of answer on that, so he asked for it.

Now of course your Honor's order is filed and you may not care to know the answer.

The Court: Well, yes, I would. If this litigation can be relieved from the burden of the expense of a special master, I shall make an order now——

Miss Martin: No.

The Court: ——vacating the assignment of the special master and let the discovery proceedings go

ahead as demanded by the parties who are seeking discovery.

Miss Martin: All I can do at this time would be to state the Government's position in response to your inquiry, and I will be happy to do that if you care at this time to hear it.

The Court: Yes. What is it?

Miss Martin: Well, the Government takes the position that the discovery proceedings is directed against the San Francisco Bank and not against the official defendants, and our only concern in them has been, and is now, that the confidential [20348] Governments which may be located in the bank's premises in connection with the duties of supervisory agents be protected from the disclosure in accordance with the claim of privilege which we have previously asserted in the case.

The Court: That is no answer at all.

Miss Martin: In addition, the Government says that we are not quite sure what was within the scope of your Honor's question, but that if it meant that the Government was to waive jurisdiction to object to the allowance of master's fees, or to object to the appointment of a special master for the discovery proceedings, or to claim the privilege as to confidential Government documents, or to waive the right to appeal from any order allowing fees to the special master, the Government could not of course object to that.

The Court: I did not ask them that question. I just asked whether or not they wanted to let the discovery proceed as requested by the parties without a special master.

Miss Martin: The Government takes the position that the presence of the special master has not been necessary because of any position taken by the Government. On the contrary, it is the view that the Long Beach plaintiffs are responsible for the appointment of a special master and that they have caused the discovery proceedings to be needlessly extended with the consequent unjustified expense.

If there is some procedure which might be worked out to [20349] save that expense, why the Government would certainly co-operate with the San Francisco Bank to that end.

The Court: There is a procedure that can be worked out, and that is, to vacate the order referring it to a special master and let the parties seeking discovery proceed with their discovery in the offices and premises of the bank or wherever they might be.

You will remember there was also discovery in connection with the taking of Mr. Fahey's deposition, of documents which were partially submitted as records of the Home Loan Bank Board. The parties seeking discovery, I have held, are entitled to it. Now if the Government is serious about wanting to save expenses here, I will just vacate the order upon the Government's motion and let the discovery proceed.

Miss Martin: Well, your Honor, you see, our position is that the discovery is the motion of the plaintiffs as against the San Francisco Bank and our interest in it is very narrow, as I outlined a moment ago.

The Court: I do not recall that that is correct. It started out as discovery in that connection, but if I remember, Mr. MacGuineas stated that he would make available, in this courtroom at that lectern that he would make available, for discovery the official files and records of the Home Loan Bank Board as they may appear to be pertinent in connection with the discovery; that he would have available in this district for [20350] examination of the parties—I think Mr. Works was here, were you not, on that day?

Mr. Works: I am not sure, your Honor. I think not.

The Court: —that he would make available in this district the records and files that were in Washington; that he would see that records and files that were in this state, either in San Francisco or Los Angeles, would not be taken from the state, even though they might be deemed part of the official files and records of the Home Loan Bank Board.

So I am a little bit puzzled at the position taken.

Miss Martin: Well, I do not follow your Honor in all of that, because I have not been in the discovery proceedings, and it was not my knowledge that any attempt to inspect the Home Loan Bank Board's records in Washington has been initiated here.

The Court: Demands were made in connection with the deposition of Mr. Fahey. Is that not correct?

Mr. Westover: That is correct.

Mr. Chapman: Yes.

The Court: Demand was made for documents.

Miss Martin: I presume then that this matter which I am discussing this morning is limited to the inspection, not dealing with the deposition of Mr. Fahey. I can't say as to that. I don't know. But the inspection of documents which has been going on pertains to the San Francisco Bank records. [20351]

The Court: I do not presume anything. You were making the statement as instructed by Mr. MacGuineas and your statement speaks for itself.

Miss Martin: Yes, sir.

The Court: So does the order of the court, so do the past records and files and statements of Mr. MacGuineas in connection with these proceedings. In the event that the Government deems it advisable to move for a vacation of the order of reference to the special master, it may be noticed and will be heard.

Miss Martin: I would take it that we do not feel that that is our position to make that move, your Honor, but nevertheless I shall report.

The Court: You just stated that you wanted to avoid the expense of the special master.

Miss Martin: I will be glad to report your Honor's suggestion.

The Court: It is not a suggestion. I am not suggesting anything.

Miss Martin: All right. I won't call it that.

Mr. Westover: Your Honor please, I would like to state for the record——

The Court: Let us not get to resenting and challenging this morning.

Mr. Westover: Not at all, except that the plaintiffs [20352] would simply like to have the record show that we do not consider the expense of the special master was at our request.

The Court: It will be deemed that any statements made by Miss Martin have been challenged and contradicted and not consented to and nothing has been waived by anybody because they have stood silently by and listened and not challenged or resented anything.

Very well. We will be in recess and I will be available here.

(At this point a recess was taken.)

The Court: Mr. Fischbach?

Mr. Fischbach: May it please the court, on behalf of the sub-committee which I have the honor to represent, I want to extend my thanks to the court for its graciousness in using its good offices to bring this stipulation into being, and the Chairman of the Committee would like very much to address the court and express his views to the court.

The Court: Well, I have a rule that no court should ever be thanked. I shall do what I think is right and not for the purpose of getting any appreciation. If the Chairman of the Committee is here and would like to make a statement that is all right.

I see that I have here a stipulation in the consolidated actions which is signed by all of the parties who have appeared except the United States Attorney and Frank G. Makepeace. [20353]

Mr. Chapman: Your Honor, I telephoned Mr. Makepeace and he informed me that because he represented one of the intervenors for a rather minor amount, he didn't think he had to attend these subsequent sessions, but that he would be glad to sign the stipulation.

The Court: Is it an intervention like the 400 pieces of property that came in?

Mr. Chapman: That is the situation, your Honor. There was one that was not in any of the accountings of Mr. Ammann, and we had no way of finding out its existence until after we were restored, and Mr. Makepeace brought certain documents to us, and we told him we couldn't honor them. He then intervened and his complaint in intervention has been permitted.

The Court: Everyone understands that in addition to all counsel who have appeared here, that there have been approximately, as I recall, 400 interventions in this case, that I have regarded, and all of the parties have regarded, them as not concerned with the ultimate outcome, and Mr. Makepeace represents a party such as those many interventions?

Mr. Chapman: That is correct, your Honor. Now he has not yet obtained his relief, as the others did obtain theirs. He did say, however—my offices are at Long Beach just a block or so away—if I would bring him a copy of the stipulation he will sign it and I can return it to the court. [20354]

The Court: I see that it is also not signed by Mr. Menzies. I suggested that somebody telephone Mr. Menzies. Did they?

Mr. Bishop: In accordance with the court's request I called, and he had just left the office for the day for duck hunting.

The Court: Very well.

Mr. Fischbach, you have observed the terms of the order?

Mr. Fischbach: I have, sir.

The Court: Is there any objection to it?

Mr. Fischbach: None whatever. I think it is a very salutary requirement.

The Court: Very well. I understand the Chairman of the Committee wished to say something?

Mr. Fischbach: The Chairman of the Committee is present and would like to address the court.

The Court: Mr. Holifield.

Mr. Holifield: Your Honor, as Chairman of the Sub-Committee of the House Committee on Executive Expenditures, charged with the responsibility of assisting in trying to solve this long-standing case, I wish to express my appreciation for the cooperation which our sub-committee counsel has received this morning from all of those assembled, and to pledge to the court that the actions of our sub-committee will be expeditious, will be directed toward the best interests [20355] of the public welfare.

The Court: Thank you.

Miss Martin, have you seen a copy of this? Have you seen the original of the stipulation?

Miss Martin: Yes. I have a copy, your Honor.

The Court: You have a copy?

Miss Martin: Yes.

The Court: Will you sign this stipulation?

Miss Martin: No. As I understand my instructions, we are not to enter into this stipulation.

The Court: Very well.

Mr. Chapman: I wonder if anything to that effect would appear on the stipulation. It seems to me that it is necessary for a transcript or abstract of a transcript to show this refusal.

The Court: The proceedings are reflected and will be attached to this. The first paragraph of the stipulation is that on the 17th day of November, 1950, proceedings transpired which are reflected in a reporter's transcript thereof to be attached hereto, which transcript, among other things, reflects the appearances.

Mr. Chapman: Fine.

The Court: Now is there any objection that the reporter shall transcribe this in the regular course of business and attach it to this original order from the Government? [20356]

Miss Martin: There is no objection to that, your Honor.

The Court: Or from anybody? (No response.)

Very well. I shall sign the stipulation. The original will be filed.

You say there is a duplicate original?

The Clerk: Yes, your Honor, signed by all the same parties.

Mr. Chapman: I would like the permission of the court to take the duplicate original to Long Beach and have it signed by Mr. Makepeace and return it to the clerk after such signature.

The Court: Is there any objection? (No response.)

Very well. Is there anything further? (No response.)

Court is adjourned.

(Whereupon, at 2:10 o'clock p.m., court was adjourned.) [20357]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 18th day of November, A.D. 1950.

/s/ AGNAR WAHLBERG,
Official Reporter.

[Endorsed]: Filed November 20, 1950. [20358]

[Title of District Court and Cause.]

DEFENDANTS' OBJECTIONS TO PROPOSED
FINDINGS OF FACT, CONCLUSIONS OF
LAW, AND ORDER RE ACCOUNTING OF
A. V. AMMANN AS CONSERVATOR

Come Now the defendants, the Home Loan Bank Board, William K. Divers, Chairman; J. Alston Adams, member, and O. K. LaRoque, member, of the Home Loan Bank Board, A. V. Ammann, George K. Bramley, and the Federal [20359] Savings and Loan Insurance Corporation, and without waiving their objections to the jurisdiction of this Court over their persons or any other objections, but specifically reserving and asserting the same, file this, their objections to the proposed Findings of Fact, Conclusions of Law and proposed Order requiring information omitted from accounting of A. V. Ammann as removee conservator, and hereby designate their disapproval as to the form thereof, upon the following grounds and in the following particulars:

Said proposed Findings and Order were served on the defendants by mail and received November 20, 1950, without opportunity for the defendants to disapprove as to form or acknowledge receipt of same as required by local Rule 7(a) of the United States District Court, and defendants therefore file their objections within five (5) days of the receipt of said proposed Findings and Order.

The only Order which the Court indicated it intended to make on the hearing of this matter was

the Order that two additional items of information be included in the accounting. Therefore, any proposed findings which are unnecessary to such an Order are irrelevant and immaterial, and defendants object generally to the Findings on those grounds.

Objections to Findings of Fact

Referring to Findings 1, 2 and 3, defendants assert that it would be sufficient in a recital to state that whereas the Court made the Order of January 24, 1948, pursuant to Resolution No. 388 and the Interim Order of February 10, 1950.

Referring to Findings 4 and 5, they are irrelevant and unnecessary to the Order which the Court intends to make. It is unnecessary to make any findings as to the disputes between the parties as to the information to be given; the only finding required is that of the necessity for the additional information which the Court is ordering. That portion of Finding 5 on Page 4, Lines 22 to 28, in so far as it incorporates Exhibit A might be requisite. The inference in Lines 28 to 32, Page 4, Finding 5, that there is an issue of disclosure or lack of disclosure is incorrect factually and unnecessary and [20360] prejudicial.

Referring to Finding 6, the Court might wish to include it as a recital but certainly not as a finding, and it appears unnecessary in any event.

Referring to Finding 7, it is objected to on the same grounds as Findings 4 and 5.

Referring to Finding 9, it is plainly self-serving

to plaintiffs, irrelevant, immaterial and appears, like many of the other findings, to be in support of some argument on the part of plaintiffs that everything they do is perfect, and everything defendants do is objectionable. That attitude appears sufficiently in the transcripts of the record and defendants doubt that the Court will want it to be included in any Findings or Order which the Court signs.

Referring to Findings 10, 11 and 12, defendants object to Findings 10 and 11 as irrelevant and assert that Finding 12 is the only one which seems relevant to the Court's Order.

Referring to Finding 13, defendants claim said finding is irrelevant since defendants do not believe the Court intends to order the Federal Bureau of Investigation to put seven accountants at work or to order said Federal Bureau of Investigation investigators to complete said accounting within any stated time. The transcript of the record shows what statements and opinions were made by Mr. Myerson of the Federal Bureau of Investigation as to the number of accountants, the time it would take, and the number who would promptly be assigned to the work. Such matters are not requisite to the Court's Order. If the Court desires any of the statements made in Court to appear in the pleadings they could be included as recitals, rather than in the Findings or Order proper.

Referring to Findings 14, 15, 16, 17, 18, 19 and 20, defendants object that they are irrelevant and immaterial to the Order of the Court, and appear in part to be the contentions of plaintiffs which

remain for issues at the trial of the action and upon which the Court certainly should not at this time make any finding. Specifically as to Finding 15, it does not appear necessary to recite such Orders; they are irrelevant to the present Order, [20361] and we object to the Court making any finding at this time regarding finality of previous Orders, their *res judicata*, etc.

Referring to Finding 21, defendants claim that said finding is not true.

Objections to Conclusions of Law

Referring to Conclusion No. 1, defendants claim it is unnecessary in this Order, the Court having previously ordered an accounting.

Referring to Conclusion No. 2, defendants object specifically to Lines 7 to 9.

Objections to Order

Referring to Paragraph 1 of the Order, defendants suggest that at Lines 5 to 7 the wording be changed to read "in addition to the information previously ordered" rather than "all of the information requested." Defendants move that the words at Lines 13 to 15 "need not now at this time" be deleted, it being apparent that plaintiffs have inserted those words with the hope that they can at some future time get the Court to make a further Order.

Referring to Paragraph 2 of the Order, defendants assert that the Court did not intend to make

any order that the Federal Bureau of Investigation complete the accounting within any stated time.

Referring to Paragraph 4 of the Order, the defendants object to same and assert that they doubt whether the Court intends to make any such order as to the finality of orders, that being a question of law not at issue [20362] as yet in this particular.

Dated: November 22, 1950.

ERNEST A. TOLIN,
United States Attorney.

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division.

/s/ ARLINE MARTIN,
Assistant U. S. Attorney,
Attorneys for Defendants.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 22, 1950. [20363]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that defendants, cross-defendants, third-party defendants, and defendants in intervention, as the case may be; Home Loan Bank Board, William K. Divers, Chairman; J. Alston Adams, Member, and O. K. LaRoque, Member, of the Home Loan Bank Board; the Federal Savings and Loan Insurance Corporation, John H.

Fahey, A. V. Ammann, and George K. Bramley, hereby appeal to the Court of Appeals for the Ninth Circuit from the "Order for Partial Interim Allowance of Fees to Special Master," dated November 9, 1950, and filed in the above-captioned actions on November 9, 1950. [20259]

Dated: November 28th, 1950.

ERNEST A. TOLIN,
United States Attorney,
CLYDE C. DOWNING, and
ARLINE MARTIN,
Assistant U. S. Attorneys,

By /s/ ARLINE MARTIN,
Attorneys for Home Loan Bank Board, William K. Divers, Chairman; J. Alston Adams, Member, and O. K. LaRoque, Member, of the Home Loan Bank Board; the Federal Savings and Loan Insurance Corporation, John H. Fahey, A. V. Ammann and George K. Bramley.

Affidavit of Service by Mail attached.

[Endorsed]: Filed November 28, 1950. [20260]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Federal Home Loan Bank of San Francisco, sometimes referred to in this consolidated action as Federal Home Loan Bank of Portland, Defendant, Cross-defendant, and

Third Party Defendant above named, hereby appeals to the United States Court of Appeals for the Ninth [20264] Circuit from the Order for Partial Interim Allowance of Fees to Special Master dated and filed in the above-captioned actions on November 9, 1950.

Dated: November 27, 1950.

/s/ VERN DUSENBERY,

/s/ PHILIP H. ANGELL,

/s/ IRVING G. BISHOP,

/s/ SYLVESTER HOFFMAN,

Attorneys for Defendant, Cross-Defendant and
Third Party Defendant Federal Home Loan
Bank of San Francisco.

[Endorsed]: Filed December 8, 1950. [20265]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL TOGETHER WITH JOINDER
THEREIN BY OFFICIAL DEFENDANTS

Appellant Federal Home Loan Bank of San Francisco hereby designates to be contained in the record on appeal to the United States Court of Appeals for the Ninth Circuit, from the Order for Partial Interim Allowance of Fees to Special Master dated and filed in the above-captioned action on [20268] November 9, 1950, all of the record, pro-

ceedings and evidence in the above-captioned consolidated, related and enjoined causes.

Dated: November 27, 1950.

/s/ VERNE DUSENBERRY,

/s/ PHILIP H. ANGELL,

/s/ IRVING G. BISHOP,

/s/ SYLVESTER HOFFMAN,

Attorneys for Defendant, Cross-Defendant and
Third Party Defendant Federal Home Loan
Bank of San Francisco. [20269]

Joinder of Appellant, Home Loan Bank Board,
et al., in "Designation of Contents of Record
on Appeal" of the Federal Home Loan Bank
of San Francisco Hereinbefore Set Forth

Appellants, Home Loan Bank Board, an agency
of the Executive Branch of the Government of the
United States, William K. Divers, Chairman, and
J. Alston Adams and O. K. LaRoque, members of
the Home Loan Bank Board; the Federal Savings
and Loan Insurance Corporation, a corporate in-
strumentality of the United States, wholly owned by
the United States; John H. Fahey, A. V. Ammann
and George K. Bramley hereby join in the "Desig-
nation of Contents of Record on Appeal" herein-
before set forth and adopt such "Designation of
Contents of Record on Appeal" in all respects the

same as if said defendants had filed a separate designation.

Dated: December 1, 1950.

ERNEST A. TOLIN,
United States Attorney,
CLYDE C. DOWNING, and
ARLINE MARTIN,
Assistant U. S. Attorneys,

By /s/ ARLINE MARTIN,
Attorneys for Appellants Home Loan Bank Board,
Wm. K. Divers, J. Alston Adams, O. K. La-
Roque, Federal Savings and Loan Insurance
Corporation, John H. Fahey, A. V. Ammann
and George K. Bramley. [20270]

Receipt of a copy of the within Designation of
Contents of Record on Appeal is hereby acknowl-
edged this 8th day of December, 1950, at the hour of
2:40 o'clock p.m. of said day.

/s/ RONALD WALKER.

[Endorsed]: Filed December 11, 1950. [20271]

[Title of District Court and Cause.]

MOTION AND ORDER FOR ADDITIONAL
TIME TO DESIGNATE CONTENTS OF
RECORD ON APPEAL

Motion

Come Now the Plaintiffs, Mallonee, et al., and
make their Motion that this Honorable Court con-

tinue the time for designation of contents of record on Appeal, to and including January 15, 1951.

This Motion is made on affidavit of counsel attached hereto and upon the files and records and records of proceedings heretofore had in this case. [20275]

Dated: December 18th, 1950.

WESTOVER & SMITH,

By /s/ STEADMAN G. SMITH,

Attorneys for Plaintiffs, Mallonee, et al., the Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association.

Order

Good Cause Appearing Therefor, It Is Ordered that all Appellees in the above-entitled matter be granted up to and including January 15, 1951, within which time to make designations of contents of record on appeal in the Order for Partial Interim Allowance for Fees to Special Master, dated and entered herein on November 9, 1950, in the above-entitled matter.

Dated this 18th day of December, 1950.

/s/ PEIRSON M. HALL,

Judge. [20276]

[Title of District Court and Cause.]

AFFIDAVIT FOR ADDITIONAL TIME TO
DESIGNATE CONTENTS OF RECORD ON
APPEAL

State of California,
County of Los Angeles—ss.

Steadman G. Smith, being first duly sworn, deposes and says:

I.

That he now is, and at all times since February 1, 1945, has been, a member of the law firm of Westover & Smith, who now appear as attorneys of record for The Shareholder Members Protective Committee of the Long Beach Federal Savings and Loan Association; that [20277] affiant now is, and at all times herein mentioned has been, a member of the State Bar of California, admitted to practice in all Courts of this State and in the District Court of the United States for the Southern District of California, Central Division;

II.

That during the period of time Westover & Smith have represented said Committee, the vast majority of the work has been performed by Wyckoff Westover, the other member of said firm of Westover & Smith, and that affiant has not been active in the litigation with regard to which said Appeal has been taken;

III.

That Wyckoff Westover has for the past few

weeks been out of the City of Los Angeles on an extended and necessary business trip to the City of Washington, D. C., in attendance before certain United States Government investigating committees with regard to the above-entitled matter, and in performance of other duties concerning said litigation;

IV.

That Wyckoff Westover left Los Angeles November 25, 1950, going to Washington, D. C., and is not expected to return to this city until late this week, or early the following week;

V.

That at the present time there is no one available in the City of Los Angeles who can determine what additional matters, if any, should be designated from the United States District Court record of the above-entitled matter;

VI.

That on November 29, 1950, and on December 9, 1950, Notices of Appeal were received by mail by the office of Westover & Smith, directing their appeal to the Order for Partial Interim Allowance of Fees to the Special Master, dated November 9, 1950, and filed in [20278] the above-entitled matter, on November 9, 1950.

Dated: This 18th day of December, 1950.

/s/ STEADMAN G. SMITH.

Subscribed and sworn to before me, this 18th day of December, 1950.

[Seal] /s/ GLENN L. SEAVEY,
Notary Public in and for the State of California,
County of Los Angeles.

My commission expires April 3, 1951.

[Endorsed]: Filed December 19, 1950. [20279]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
RECORD AND DOCKETING APPEAL RE
SPECIAL MASTER'S PARTIAL INTERIM
FEE ALLOWANCE

It appearing that the original forty days for filing the record and docketing the appeal in the below appeal with the Court of Appeals will expire on January 8, 1951, and it further appearing that the Clerk of this Court will not be able to file such record within such time:

It Is Hereby Ordered that the time for filing the record and docketing the appeal with the Court of Appeals for the Ninth Circuit in the appeal of the Federal Home Loan Bank of San Francisco and of the Home Loan Bank Board, et al., from the "Order for Partial Interim Allowance of Fees to Special Master," dated November 9th, 1950, and filed in the above-captioned actions on [20280] November 9,

1950, is extended to and including February 27, 1951.

Dated: This 8th day of January, 1951.

/s/ PEIRSON M. HALL,
District Judge.

[Endorsed]: Filed January 9, 1951. [20281]

[Title of District Court and Cause.]

DESIGNATION BY APPELLEES OF ADDI-
TIONAL PORTIONS OF RECORD ON
APPEAL [20282]

Appellees:

1. Mallonee, Bucklin and Fergus, Shareholder Members Protective Committee of Long Beach Federal Savings and Loan Association, Plaintiffs; and

2. Long Beach Federal Savings and Loan Association, Cross-Claimant and Third-Party Plaintiff:

(in all appellees' capacities, individual, representative or otherwise), hereby designate to be contained in the record on appeal to the Court of Appeals for the Ninth Circuit, on the appeal heretofore taken by:

A. Appellants, Home Loan Bank Board, Federal Savings and Loan Insurance Corporation, and William K. Divers, J. Alston Adams,

O. K. LaRoque, John H. Fahey, A. V. Ammann and George K. Bramley, individually and in their respective representative and official capacities, on or about November 28, 1950, and

B. Appellant, Home Loan Bank of San Francisco, sometimes referred to as the Federal Home Loan Bank of Portland, on or about December 8, 1950,

from the order for Partial Interim Allowance of Fees to Special Master, dated and filed in the above-captioned actions on November 9, 1950, all of the records, proceedings and evidence filed, transcripts, exhibits and all other documents to the above-captioned consolidated, related and enjoined causes, including all matters therein from the commencement thereof to the date of this further [20283] designation.

Dated this 15th day of January, 1951.

WESTOVER & SMITH,

By /s/ WYCKOFF WESTOVER,

Attorney for Mallonee, Bucklin and Fergus, Shareholder Members Protective Committee of The Long Beach Federal Savings and Loan Association, Plaintiffs, and Charles K. Chapman.

/s/ CHARLES K. CHAPMAN,

Attorney for Long Beach Federal Savings and Loan Association, Cross-Claimant and Third-Party Plaintiff.

[Endorsed]: Filed January 15, 1951. [20284]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that defendants, cross-defendants, third-party defendants, and defendants in intervention, as the case may be, Home Loan Bank Board, William K. Divers, Chairman; J. Alston Adams, Member, and O. K. LaRoque, Member, of the Home Loan Bank Board; the Federal Savings and Loan Insurance Corporation, John H. Fahey, A. V. Ammann, and George K. Bramley, hereby appeal to the Court of Appeals for the Ninth Circuit from the "Order for Partial [1] Interim Allowance of Fees to Special Master," dated March 9, 1950, and filed in the above-captioned actions on March 9, 1950.

Dated: May 5, 1950.

ERNEST A. TOLIN,

United States Attorney.

CLYDE C. DOWNING, and

PAUL FITTING,

Assistant United States
Attorneys.

By /s/ PAUL FITTING,

Attorneys for Home Loan Bank Board, William K. Divers, Chairman; J. Alston Adams, Member, and O. K. LaRoque, Member, of the Home Loan Bank Board; the Federal Savings and Loan Insurance Corporation, John H. Fahey, A. V. Ammann and George K. Bramley.

[Endorsed]: Filed May 5, 1950. [2]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that Federal Home Loan Bank of San Francisco, sometimes referred to in this consolidated action as Federal Home Loan Bank of Portland, Defendant, Cross-defendant, and Third-party Defendant above named, hereby appeals to the [3] United States Court of Appeals for the Ninth Circuit from the Order for Partial Interim Allowance of Fees to Special Master dated and filed in the above-captioned actions on March 9, 1950.

Dated: May 3, 1950.

/s/ VERNE DUSENBERRY,

/s/ PHILIP H. ANGELL,

/s/ IRVING BISHOP,

/s/ SYLVESTER HOFFMAN,

Attorneys for Defendant, Cross-Defendant and
Third-Party Defendant Federal Home Loan
Bank of San Francisco.

[Endorsed]: Filed May 5, 1950. [4]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD ON APPEAL

Appellants Home Loan Bank Board, William K. Divers, Chairman; J. Alston Adams, Member, and O. K. LaRoque, Member, of the Home Loan Bank

Board; the Federal Savings and Loan Insurance Corporation, John H. Fahey, A. V. Ammann, and George K. Bramley, hereby designate to be contained in the record on appeal to the Court of Appeals for the Ninth Circuit from the "Order for Partial Interim [8] Allowance of Fees to Special Master," dated March 9, 1950, and filed in the above-captioned actions on March 9, 1950, all of the record, proceedings, and evidence, in the above-captioned actions.

Dated: May 17, 1950.

ERNEST A. TOLIN,
United States Attorney.

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief of Civil Division.

PAUL FITTING,
Assistant U. S. Attorney.

By /s/ PAUL FITTING,
Attorneys for Home Loan Bank Board, William K. Divers, Chairman; J. Alston Adams, Member, and O. K. LaRoque, Member, of the Home Loan Bank Board; the Federal Savings and Loan Insurance Corporation, John H. Fahey, A. V. Ammann and George K. Bramley.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 17, 1950. [9]

[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD
ON APPEAL

Appellant Federal Home Loan Bank of San Francisco hereby designates to be contained in the record on appeal to the United States Court of Appeals for the Ninth Circuit, from the Order for Partial Interim Allowance of Fees to Special Master dated and filed [13] in the above-captioned action on March 9, 1950, all of the record, proceedings and evidence in the above-captioned consolidated, related and enjoined causes.

Dated: May 15, 1950.

/s/ VERNE DUSENBERY,

/s/ PHILIP H. ANGELL,

/s/ IRVING BISHOP,

/s/ SYLVESTER HOFFMAN,

Attorneys for Defendant, Cross-Defendant and
Third-Party Defendant Federal Home Loan
Bank of San Francisco.

Receipt of copy acknowledged.

[Endorsed]: Filed May 17, 1950. [14]

In the United States District Court, Southern
District of California, Central Division

Honorable Peirson M. Hall, Judge Presiding.

No. 5421-PH Civil

PAUL MALLONEE, et al.,

Plaintiffs,

vs.

JOHN H. FAHEY, et al.,

Defendants.

No. 5678-PH Civil

FEDERAL HOME LOAN BANK OF LOS AN-
GELES, a Body Corporate, et al.,

Plaintiffs,

vs.

FEDERAL HOME LOAN BANK OF PORT-
LAND, a Body Corporate, et al.,

Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

April 19, 1948

Appearances:

For Plaintiff and Shareholders Protective
Committee:

WESTOVER & SMITH,

1009 Pacific Southwest Building,
Los Angeles, California; by

WYCKOFF WESTOVER, ESQ.

For Defendant and Cross-Claimant Long
Beach Federal Savings & Loan Association:

CHARLES K. CHAPMAN, ESQ.,
17 Ocean Center Building,
Long Beach 2, California.

Also Present:

RONALD WALKER,
Special Master in Chancery.

April 19, 1948—10:00 A.M.

(Other court matters.)

The Court: Mallonee v. Fahey.

What are the appearances on this matter?

Mr. Westover: The apperances for the plain-
tiff Shareholders Protective Committe, Westover
& Smith, by Wyckoff Westover.

The Court: Mallonee and others?

Mr. Westover: Mallonee and others.

The Court: And Mr. Chapman for the Associa-
tion?

Mr. Chapman: That is right.

The Court: The notice here was served upon
whom?

Mr. Walker: Notice was served by mail upon
the other parties, your Honor, the two banks and the
United States Attorney's office.

The Court: Bishop & Hoffman, O'Melveny &
Myers and the United States Attorney.

Mr. Walker: Yes.

The Court: Any appearance on behalf of the

United States Attorney? (No response.) There appears to be none.

Were Newendorp and Bradley notified? There has been no order directing consolidation yet.

Mr. Walker: I didn't serve the notice on them, your Honor. [3*]

The Court: Robert H. Wallis? (No response.) Was he notified?

Mr. Walker: No, your Honor. The interpleaders were not served. I served only the principal parties in the main action.

The Court: Have you talked to Mr. Tremaine, the attorney for Wallis?

Mr. Westover: Yes, I have discussed it with Mr. Tremaine.

The Court: How about the Title Service Company?

Mr. Chapman: They have had knowledge, your Honor. They are not contesting this.

The Court: Have either of you or any of you discussed with them the matter of this application?

Mr. Chapman: I have discussed it with counsel for Mr. Robert Wallis and counsel for Title Service Company.

The Court: And they are familiar with the fact that it is coming up today?

Mr. Chapman: They are; that is right.

The Court: Very well.

Mr. Walker, you did not make any suggestion in this petition here as to what your interim allowance should be.

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Walker: I will be glad to do that, your Honor.

The Court: I see two figures mentioned here, one is 26 million dollars and the other \$600,000, then 5 million and [4] 2 million and 4 million.

Mr. Walker: There is one there of \$800,000 also.

The Court: Very well. What is your idea of what an interim allowance should be?

Mr. Walker: Your Honor, this is the type of case where it is rather difficult to put a dollar sign in front of the value of services. The court is aware of the consequence of the case and the problems which have been presented. In suggesting a figure I have in mind that this is a financial institution where millions of dollars are at stake, also involving some 8000 borrowers, and some of the work has dealt with the clearing of titles to the homes of these borrowers. Further, that this is the type of institution in which public confidence must be maintained, particularly after a turnover of this nature.

The Court: And particularly in view of the acrimony of the present litigation.

Mr. Walker: Yes.

The Court: And the congressional investigation.

Mr. Walker: Yes, and two years of bitter fighting.

There was no loss of deposits, no withdrawals of any consequence attending the turnover; as a matter of fact, the deposits increased.

This was the type of case where adverse publicity would injure the institution, had already done so, and I attempted [5] to have those matters com-

posed so that there would be a minimum of any publicity, which we were successful in doing.

Other factors which influence me in suggesting a figure to your Honor are the fact that in accepting the assignment at the request of the court I had to leave a position of some responsibility, I have been at considerable expense in having to live in Long Beach during the whole period of approximately three months and——

The Court: You have been practically in attendance 24 hours a day?

Mr. Walker: It has required full-time services, your Honor.

The Court: In other words, you had to move from your home and take up living quarters in Long Beach and be available at all times there?

Mr. Walker: That is right, sir. So that considering all of those factors, plus the factor which is, I think, in every attorney's mind when he considers fees these days, there is a rather heavy tax imposed, so I would suggest that an allowance at this time of a fee of \$25,000 would not be disproportionate in a case of this consequence.

The Court: By the way, I have allowed certain expenses to you in the interim here that have been accumulated for your trip to Washington, your trip to——

Mr. Walker: I made two trips, one to Washington for a [6] period of 10 days.

The Court: And for certain stenographic expense. What do they total?

Mr. Walker: The allowances for traveling ex-

penses totaled \$1500. I had intended to file a complete statement with my final report.

The Court: In the rough, what is the total amount now that has been expended for that and for stenographic hire of the master?

Mr. Walker: For traveling expenses, \$1500, most of which was used in traveling expenses.

I am sorry but I don't have the figure available for the payroll expenditures. It started at a rather sizeable sum and it has decreased rapidly. I now only have two persons on the payroll and probably as of this week will have only one. I cannot answer your question because I don't have the totals here, your Honor.

The Court: Very well. It does not exceed probably \$1000 or \$2000?

Mr. Walker: I think the sum of \$2000 would amply cover it.

The Court: Does anybody else wish to be heard in connection with the matter?

Mr. Westover: Your Honor, just for the purpose of the record, while of course Mr. Walker doesn't have the heavy [7] overhead, he has given up a very substantial position, he has done a splendid job, and the transfer of the assets of a 26 million dollar institution is a good deal more of a detail job than a lot of us anticipated even in the beginning. I am informed that since January 24th, the effective date of your Honor's order, duplicate microfilm photographing of documents has been going on that have now exceeded something probably

in the nature of 30,000 documents photographed before you could even give a receipt, a thing that in the form of transferring of assets would be a few moments' job and instead has taken a couple of months or more.

Mr. Walker's services along those lines have been very helpful. His maintenance of confidence of this institution, of the public in this institution, in assisting in there I think have been very beneficial to the shareholder members. Of course there were approximately 16,000 shareholder members at the time of the seizure back in May of 1946, and probably the cards exceed that amount by a goodly number now because of the in and out that have gone on during the past two years. To date I understand that the mechanics even of that work have not yet been completed, the magnitude of it is so great.

Therefore I don't feel that the suggested amount is particularly out of line, although at first blush it might seem somewhat large until you realize the magnitude of the job [8] that is being handled.

Also I take it that this is an on account allowance and certainly Mr. Walker or any other person handling a responsible position such as he does, would, of necessity, need money to live on for several months to come in the future, and I take it that this allowance will carry along and will be considered in the final accounting that no doubt your Honor's special master will render to the court for final approval when the job is completed.

Therefore on behalf of the shareholder members

and the plaintiffs in the action I at this time can offer no objection to the amount.

The Court: Do you consent to it?

Mr. Westover: Yes, certainly; I believe so, your Honor. I believe it is a matter for your Honor's discretion rather than for my determination one way or the other.

The Court: I appreciate that, but do you consent to his request for \$25,000 interim allowance at this time?

Mr. Westover: Let me put it this way, your Honor: Whatever amount your Honor feels is proper for this magnitude of work is satisfactory.

The Court: It being understood that whatever allowance is made at this time will not be an appraisal by the court of the value of the services either rendered or possibly to be rendered? [9]

Mr. Westover: That is my understanding. This is more or less of an interim allowance on account so he will have something to live on while he is devoting his full 24 hours a day time to the job.

The Court: Mr. Walker, do you have any estimate now as to the length of time that the special mastership will be required to continue?

Mr. Walker: I would estimate at the present time, your Honor, another three months minimum. It may take longer than that.

The Court: That is, three months as a minimum on the proper basis. In the event the restoration of the Los Angeles Bank is effected and it is required to have the services of a master in that connection I would, of course, deem it appropriate to appoint

you. Do you have any estimates on what would be required then?

Mr. Walker: It is a little hard to estimate because there would be no way of predicting the action of the Home Loan Bank Board as to methods. I would say that it probably, in the event that it was done and the services of the master were required, it probably would last until the end of the year, probably longer.

The Court: If I understand it from you petition now, the major rivers, hills or mountains, or whatever obstruction you might call them, in connection with the turnover have [10] been passed so that now it remains mostly a matter of accounting.

Mr. Walker: The matters of great urgency have all been completed. There is still the election which Mr. Chapman and I were discussing this morning, which it is presently anticipated will be held sometime next month. There is also the accounting.

On the accounting, the examiners are I think this week completing their audit of the Association. The accounting will then be prepared, I assume, by the legal department of the Home Loan Bank Board and submitted for consideration. That will probably be a long and tedious task.

The Court: The physical job of accounting will be completed this week?

Mr. Walker: It is almost complete now; yes.

The Court: Then thereafter they will make a record. Now you indicated you had not gone into the old records of the Association in your report. Will

that come later or will that be included by them in their accounting?

Mr. Walker: I stated in my report, your Honor, that we had deferred the transfer of some of the old records and some of the records concerning the operation of the Association by the conservator because of certain negotiations which were being conducted in the bank case which would involve releases to be given to the various persons [11] involved and involve payment of certain sums of money to the Association from the funds now in court. If those negotiations were successfully completed, it will obviate the necessity of microfilming thousands of these documents. They could just be turned over and the old records would then just be turned over en masse. There has been no urgency as to a few old records.

The Court: You hope and expect that it will not be necessary to make a detailed accounting of all these records?

Mr. Walker: That is right. It would save considerable expense if that were done.

The Court: Mr. Chapman?

Mr. Chapman: Yes, your Honor.

I think Mr. Walker is a bit optimistic about the time of his future service. I think that he is going to be required to assist——

The Court: Just a moment. The record will show that Mr. Carter, the United States Attorney, has just come in. We are hearing this Long Beach matter. Are you appearing on that matter?

Mr. Carter: No, your Honor. However, my name can appear.

The Court: Very well.

Mr. Chapman: The first thing I would like to say, your Honor, is I think the workman is worthy of his hire. Mr. [12] Walker has been of very vital service to our Association at an extremely critical time, and I think that we can judge very well the quality of his efforts by their success. This was a time which, from the start of this case, we had dreaded, we were glad to be back but the possible turmoil and controversy and antagonism, the things that could have happened and did not, I think should be measured in weighing the value of his services. I think he is very modest in asking for \$25,000. I realize it is only an on-account allowance and I certainly hope that when the time comes, which this thing is all wound up, that he will be adequately compensated for all that he has done to help our institution. I say this despite the fact that he and I have had some late-hour arguments in private sessions many times on things that we disagreed on, and always there was some compromise achieved. We found a way to do it without harming anyone.

I think that one of the finest contrasts that we can make, something where I was present, where Mr. Walker was not—of course your Honor has heard about it second- or third-hand—that was the attempt to transfer the institution with the court order and without a special master on the 1st and 2nd of October, 1946. That involved some of the

most acrimonious controversial riots—that I think is the only word you can use for it—people with thousands of dollars in money shoving them at each other and refusing to give [13] receipts or to count it. There it is. If you want it come and take it. I saw more money than I had ever seen in my life and there was nobody there to take responsibility for it. Millions of dollars in bank accounts must have been transferred that night so that we could open for business the next morning, and there were lots of questions of whether or not they were going to levy an assessment on the bank and collect that money. All of those things didn't happen, and the only new factor—we had a court order then and we have a court order now—the only new factor was your special master, Mr. Walker. I think that the success of his mission should be measured in figuring his compensation. I do think he is overly modest and I think it is a good thing that he is. That is probably one of the reasons things worked out so nicely.

The time will come probably closer to his estimate than to mine on how long it will take and how hard it will be since he is the court's representative, but I do think that this accounting will involve enormous detail, and I do know that Mr. Walker has given up a valuable position to take this task of assisting the court and I know that having gone this far with it we cannot spare him until the case is finally closed, however long that may take. Therefore he is putting his personal interests, his personal law practice—I understand

that he has been an attorney for better than 20 [14] years—putting all that behind him to benefit this Association. I think we are able to compensate him for what he is doing for us and I think we should. I think the \$25,000 for the services he has performed and is yet going to have to perform is inadequate, but it is his figure, it is what he wants to set. I not only consent, but I join with the application and I want to at this time extend my thanks to the court in selecting Mr. Walker.

The Court: Do not thank me for anything. No judge is here to be thanked.

Mr. Chapman: If you could have seen the difference between October 1, 1946, and January 24, 1948, you would think there was something for everyone in that Association to be thankful for. I am not even mentioning May 20. The court had nothing to do with that, so we won't compare it.

I think that that is all I can say on the subject except that we have this situation: Mr. Walker is now at a stage where no one else can take up his work, he couldn't step out and we have another special master, he has to stay there until finished and it may mean many months yet and we wouldn't want him to have financial worries during that interim.

The Court: I understand, Mr. Walker, that it is your anticipation that if possible you will continue until your final report without requesting further interim allowances?

Mr. Walker: I believe that that is so. [15]

The Court: That, however, will not be a necessary corollary of any order which I might make.

Mr. Carter, do you wish to be heard in connection with this matter?

Mr. Carter: I think a workman is worthy of his hire. I went down the other day to one of the judges of this court who had allowed an attorney 10 per cent on a \$5000 recovery under the Tort Claims Act, rather vigorously protested to the court and said that no lawyer could take that kind of a case if he is going to be allowed less than the amount set by the statute, which was 20 per cent, and he wasn't too successful. However, I put myself very clearly on record that attorneys' fees should be paid. Having known Mr. Walker for many years, I know the kind of chap he is and the kind of work he does. I am not too familiar with all these other cases. But I have read his petition and I concur in what Mr. Chapman has said.

The Court: Do you have something else, Mr. Westover?

Mr. Westover: Only one point that possibly has no bearing on this, but Mr. Walker suggested an election. I did want to take issue with him on that, that is, as to his time of it. It seems to me that there are many things which make that impossible now, but I didn't want to get into it.

The Court: One of the conditions of the order was that an election should be held as promptly as possible. [16]

Mr. Westover: That is correct, your Honor. It is the impossible phase of it that I have in mind. But I don't believe it is appropriate to argue it here, other than to raise the point that I didn't

want to let it pass as though I had consented to that phase of it. I think the immediate necessity of it is something he may have overlooked.

The Court: I still think it should be held as promptly as possible. I do not know what makes it impossible, but I think it should be done.

Well, I probably am as familiar with the problems that are connected with this case as any other person not actually one of the parties litigant or counsel. In appointing Mr. Walker as a special master, it looked to me like it would be an almost impossible job to get anybody who could perform the work in such a way that the assets of the Association, its goodwill, welfare of the stockholders and the borrowers could be saved. Any person other than Mr. Walker or someone intimately connected with the litigation who would have gone in there, would have taken at a minimum a week or two weeks at least to familiarize themselves with what had gone on and what the status was and the things to look out for. I think his work has been remarkable. I appreciate the fact that allowances on these matters cannot be made on a time basis. The thought that occurs to me in connection with the matter, not that there is any similiarity between the occupation I am [17] about to mention and the work done by Mr. Walker, that of a knife thrower in a circus, but it only takes about half a second and it does not take very much effort to throw a knife, but if you were not very skilled I should guess that probably the result would be rather disasterous.

So I think that Mr. Walker's skill and his ability

in connection with the matter here is a matter that is of the utmost importance and is a matter which deserves compensation more than his actual time, although I should say that a lawyer giving up a position and moving his residence to the scene of the litigation, and being on call 24 hours a day—and I have no doubt but what there were many times when the day was almost endless in connection with these problems—that in itself is deserving of some additional compensation.

I have to keep in mind one thing, however, and that is that no doubt there will be many applications for allowances of fees to lawyers in connection with this matter subsequently arising. I am afraid that if I should allow the full \$25,000 that a great many people would take that as a standard or an index of the fees which I might ultimately come to a conclusion should or should not be allowed. I know Mr. Walker is a modest individual. In fact, I think it would do to state for the record that I talked to him in chambers and he kept repeating that he did not have any figure in mind and it was only upon my insistence that he go to work and get [18] some figure in mind and state to me that figure, that I would then be able to make any allowance at all.

I will make the interim allowance \$20,000. That will be without prejudice to the renewal of any interim request in the event it becomes necessary, and it is not to be taken as an indication of my judgment as to the value of the services rendered to date or to be rendered. An appropriate order will be prepared.

Mr. Walker: Your Honor, might I ask—is it your intention to go to Fresno or are you going to be here?

The Court: I will be here this week. I will be in Fresno next week, beginning Monday.

Mr. Chapman: As the recipient of the thrown knives, I want to express my appreciation to the court for at least a fair allowance. I think it could well have been larger, but I think we must keep Mr. Walker's services as long as we need him, and that is the important thing.

The Court: Very well.

(Other court matters.) [19]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 21st day of February, A.D. 1951.

/s/ AGNAR WAHLBERG,
Official Reporter.

[Endorsed]: Filed February 21, 1951. [20]

REPORTER'S TRANSCRIPT OF
HEARING ON MOTIONS

Los Angeles, California

October 20, 1948

Appearances:

For Plaintiffs and Shareholders Protective
Committee:

WESTOVER & SMITH,
1007 Pacific Southwest Building,
Los Angeles 14, California, by
WYCKOFF WESTOVER, ESQ.

For Long Beach Federal Savings and Loan
Association:

CHARLES K. CHAPMAN, ESQ.,
22 Ocean Center Building,
Long Beach 2, California.

For Federal Home Loan Bank of San Fran-
cisco:

IRVING G. BISHOP, ESQ.,
810 Chester Williams Building,
Los Angeles 13, California, and
SYLVESTER HOFFMANN, ESQ.,
810 Chester Williams Building,
Los Angeles 13, California.

For Federal Home Loan Bank of Los Angeles:

O'MELVENY & MYERS,
900 Title Insurance Building,
Los Angeles, California, by

JOHN WHYTE, ESQ., and
RICHARD FITZPATRICK, ESQ.

For Defendant Ammann, Individually and as
Conservator; and for Defendant Fahey, Indi-
vidually and as Commissioner:

JAMES M. CARTER,
United States Attorney,
Los Angeles 12, California, by

ARLINE MARTIN,
Assistant United States Attorney.

For Ten Associations and Eighty Individual
Defendants and Cross-Defendants:

JAMES E. BURNS, ESQ.,
San Francisco, California, and

HAROLD C. HOLMES, JR., ESQ.,
San Francisco, California.

For Federal Home Loan Bank Board:

WILLIAM F. McKENNA, ESQ.,
Washington, D. C.

Also Present:

RONALD WALKER,
Special Master in Chancery. [2*]

* * *

Mr. Bishop: Your Honor, we have heard considerable argument from the other side about the need for inspection and the right to inspection. We don't deny that. We contend, however, if they want the benefits of Rule 34 that the burden is upon them to show by their motion and their affidavits, first of all, that good cause exists; secondly, that Rule 30(b) will not be transgressed, that is, that it will not subject the parties defendant to annoyance, embarrassment or oppression.

While I am still discussing these elements of what they have to show to have this court indulge in the rule of liberality of inspection, I might say that they will point out possibly, because it appears manifest that the court is going to give some order of inspection, that my argument will help in imposing limitations of the order to be granted by this court. [69]

* * *

The Court: I do not think the documents are privileged.

Mr. Bishop: Your Honor, on that point I would like to——

The Court: I have examined your points and authorities in that respect and I do not think that the documents are privileged. As I indicated, however, I will exercise the limit of my power under Rule 30(b) in connection with preserving the confidential nature of these records.

Mr. Bishop: I would point out, your Honor, that as far as our bank is concerned we have certainly records in our possession that are not our records.

We are merely in that capacity as an agent for the National Board in a supervisory inspection and examination, position.

If you will look at the rule that we have heard so much about—— [70]

The Court: Do you have a list, for instance, of the records of the bank? I appreciate that the motion here is subject to some criticism perhaps by virtue of its request for all those books and records, but having been attorney for parties litigant before I do not even know what books they keep. What can you ask for except all of them? Now if you can designate the type of books and records that they keep—even Mr. Vander Ende on the witness stand the other day was shown some book here that was produced and he did not know that they kept that kind of book; in other words, a minute book, directors' minute book, which relates again to another book, which appeared to relate again to another book that had orders and communications and ukases and fiats in it.

Mr. Bishop: I think the affiant in this case, that is, the particular affiant's affidavit, is far more familiar than I am with what the books and records are. He was a director.

Mr. Chapman: Not of your bank.

Mr. Bishop: You have asked for everything from all three banks, whatever they are, Mr. Chapman, from the beginning of time to the end of the world. [71]

* * *

There is another situation that I call your atten-

tion to, and I feel that I am on proper ground in so stating, the National Home Loan Bank Board is a party defendant here. I challenge their good faith again. Why isn't the motion directed to their records as well?

The Court: Maybe they will come back later and ask for that. I do not know.

Mr. Bishop: Then it isn't timely.

The Court: The only thing I have before me now is what they have asked for. I am not concerned with what they might want in the future or might not. [74]

* * *

Mr. Bishop: I know, but they could at least specify the time. I don't think we need them for all these 16 years. It is expensive.

The Court: Some limitation, of course, will be put on, as I indicated. I will exercise the power that the court has under Rule 30(b). [75]

* * *

Mr. Bishop: So that the court, as well as opposing counsel, will then have the benefit of what I believe should be considered in the order, it would seem to me that a limitation of the order should fix the time of examination, place, who is to be in charge of the examination, some limitation as to the documents to be examined, correspondence permitted to be examined—I don't believe that they are entitled to go into the correspondence between counsel and the officers of this bank as to our defense or such evidence as we may have for impeachment

of their witnesses or such evidence as we may desire to use by way of cross-examination. [76]

* * *

The Court: They are entitled to have inspection of documents to ascertain what is in your files and then they may subsequently designate what they desire to have copied and photographed, and at that time I will determine whether it is material or not material.

Mr. Bishop: The whole value, if they examine privileged documents, would be destroyed, your Honor.

The Court: I think in so far as your communications—I am not prepared to say at this time—but I think perhaps in connection with the communications between attorney and client, that they would be privileged. [77]

Mr. Bishop: I am pointing that out as what should be possibly within the limitation of an order for a special master. It saves a lot of argument and discussion if that is within the order, such limitations as that. I do think that there should be some limitation as to how far back this can go. Counsel can certainly make some suggestions as to that.

The Court: Yes. [78]

* * *

The scope of the present motion on its face does ask for documents which are not alone those of the bank, but which are documents of the Home Loan Bank Board entrusted to the bank. In its broad terms it will cover the motion at least, it will cover

documents that have no relationship whatever to this case but are purely supervisory matters between the Home Loan Bank Board and these other institutions in the state which [85] are not, or in the area which are not, directly concerned with the litigation.

Now we recognize that once the court has determined there is jurisdiction somehow or other somebody is going to make the determination whether these documents are material or not, and in making that determination I suppose somebody has to be there with an opposite viewpoint from ours to see that both sides are fairly treated. I think when jurisdiction is determined and the cause of action is determined that we can do that with a great deal of cooperation, that there isn't going to be any throwing out of the words "confidential" or "privileged" unnecessarily. We are going to try to cooperate.

The Court: I have held, have I not, that the complaint states a cause of action against the bank? [86]

* * *

The Court: It seems to me that your problem here, in view of the concession that if it is material to the action—and that would be my ruling anyhow, that it would not be privileged—that the problem here is to protect what may be rather broadly stated as to what you have described as the public interest not involved in these proceedings. That is to say, the interest of other associations and banks and

things that do not concern them. It is a matter, it seems to [89] me, principally of mechanics. [90]

* * *

Mr. McKenna: Then, your Honor, with the ruling of the court—we were discussing the scope of it—it certainly hasn't been suggested by the plaintiffs——

The Court: May I say this, that it looks to everything they have alleged in their complaint and then the determination must be made when the particular document is wanted to be copied or photographed, as to whether it is material with relation to anything that is alleged in these complaints. In the meantime they do not know what it is. They do not know what they are looking for. They do not know what documents exist. And they are entitled, it seems to me, to have the right to inspect. But I am not going to give them *carte blanche* to inspect without a supervision under Rule 30(b). [92]

* * *

The Court: I do not know when I will be able to hear them now because for the remainder of this year I have the criminal calendar, which is taking all of my time. I think that under the situation here I should grant discovery, and the thing to be determined now is how I should limit it. I do not know whether the parties can agree on the period of time the documents are to be examined. If you can it would be helpful to the court. Otherwise I am going to have to get some information from somebody about what documents there are, what

books there are, what they relate to, in order to make the order. Therefore in order to bring the matter to a head I will grant the motion for inspection, subject to such limitations as I shall place on it. I will defer and put off calendar the motion for copying or photographing until it can be reset on notice after inspection.

Now the question is, what limitations do the parties [96] desire to place on the inspection? The court has the power to designate the persons, the time (which of course would be during business hours), the place (which of course would be the place where the books are kept), and the court may also, as I indicated yesterday and probably should if the parties request it, if the defendants request it, have the inspection conducted under the auspices of a special master.

Now do the defendants request it?

Mr. Bishop: I did not understand the rule to require that we have to request it. I don't think it does.

The Court: You do not have to say anything.

Mr. Bishop: I think that is part of the exercise of discretion of the protection that we are entitled to if inspection is ordered.

The Court: If you request the appointment of a special master and some limitations on these times, I will grant them. I will not say I will grant all that you request, but in so far as the special master is concerned, and any fees that may be due the special master, if the parties are concerned about that, I think that any fees that are allowed to him

in that connection—I would appoint Mr. Walker, of course, who is already acting as special master, and this would be an additional assumption of duties on his part—I would allow him fees from funds on deposit in the court, regardless of who ultimately becomes entitled to them. [97]

Is there any possibility of the parties agreeing upon the time that the books are to be examined, or not?

Mr. Chapman: We would like to try, your Honor.

Mr. Bishop: There will be no difficulty about that.

I am not prepared, though, to make the request for an appointment of a special master. I would have to get authority for that. [98]

* * *

The Court: I think probably in view of the fact that counsel on either side do not seem to be well informed concerning the nature of the records that are kept, that it might be well if I did make a preliminary order of inspection, designating counsel for the parties and no other person, to go with a special master appointed by the court, to make a preliminary inspection of the books and records and then to return to the court and have the court definitely designate [100] what records they shall have the right to inspect with their accountants and any other person who might be needed.

* * *

Mr. Bishop: Your Honor, I think I can make a

suggestion that may be of some help here. The court has made its ruling, made its order, with a guide as to what counsel has in their own minds. I suggest the moving parties prepare such an order as they think is necessary and we will give all the cooperation that is reasonably possible with our limited knowledge of the records. The special master could be appointed, make his own examination first to determine what records he found, and then report without anybody else examining them. [101] He reports to the court then what he has found and then the court makes its further and enlarging order. I mean that is the purpose of a special master, to save the court all that time.

The Court: I think that probably could be done. The special master could examine the records and report to this court what records they keep and what is in what books, and from that the court then might make a determination as to what records should be subject to inspection. That sounds reasonable to me.

Mr. Bishop: About the special master feature, your Honor, I want to make a statement to the court. I don't want to appear to be obstructing here, but it would be highly improper, with Mr. Walker officing in my office——

The Court: Is he officing with you?

Mr. Bishop: He is officing in my office. Not as attorney and servant or associate or employee, but I don't want any reflection on the court or myself by making such a request.

The Court: I do not think that that detracts

from either of you, having him office in your [102] office.

* * *

The Court: That is not my contemplation. The contemplation of appointing a master alone, or as I had in mind in my original suggestion, was that I would fix a time and in the presence of a special master and counsel for the moving parties and counsel for the bank should go up and look at the records and say, well, this is the stockholders' records, and this is correspondence relating to so-and-so, and here are the minute books, and so forth, and these are other records, and then determine from that—you would not want to examine the private loan file of some institution in Idaho or something like that, but that is comprehended within your whole order. [104]

* * *

The Court: Let me see if I can review this order now.

The order of the court will be that the motion for the copying and photographing of documents will go off calendar to be reset—I will just continue that until November 15th inasmuch as I am fixing another date, and at that time continue it subsequently.

The motion for the inspection of documents will be granted, subject to this limitation, that in the presence of Mr. Chapman for the Association, Mr. Westover for the Mallonee Group, and Mr. Fitz-Patrick for the Los Angeles Bank, and in the presence of three representatives which may be

designated, either counsel or otherwise, of the defendant banks, or bank, and in the presence of Ronald Walker, who is appointed special master for the court for this purpose, a general examination of the type and character of books and records which are kept by the defendant bank shall be made and concluded at the place or places of business and during business hours of the defendant bank or banks prior to November 12th, the matter to be continued before this court to November 15th at 10:00 o'clock in the morning, the special master to then report [110] upon the nature and character of the books and records kept, at which time the court will then designate the type or types of books and records which may be inspected by the movants in detail.

Is that understood? (Assent.)

Mr. Walker: Does the court want to have a formal order of appointment enlarging the power of the special master?

The Court: Yes. There should be a formal order and a provision that any fees allowed the special master shall be paid out of the funds on deposit in court, and expenses of the special master.

Mr. Walker: The funds on deposit in court, some of them, admittedly belong entirely to the Long Beach Association. As to the rest, there are conflicting claims.

The Court: We will argue about that later. Some funds on deposit in court.

There should be a formal order and there should be a formal order drawn outlining the order that

I have made here, and in order that the Clerk may have his minutes all together, I will now put off calendar the motion for inspection, copying and photographing and discovery as to the ten associations to be reset on notice. If you can incorporate all that into a formal order and enlarge the powers of the special master and submit it, I will sign it.

Anything else? (No response.) [111]

* * *

November 29, 1948—10:00 A.M.

* * *

Mr. Westover: If your Honor please, in the Mallonee matter I believe all counsel are probably here in the room. A special master's report was handed to myself this morning and I believe all other counsel have it. The recommendations of the special master appear on page 13, I think, of his report, and they seem to be in general at least agreeable to those counsel I have talked to—I haven't talked to all of them—and it looks like it might be possible for us sometime later today, if your Honor would care to get the appropriate order made by your Honor for, as I understand it, a general order of inspection of the records, subject to general rules which your Honor may want to lay down for the guidance of the special master. [3*]

* * *

The Court: With relation to this order, is there a possibility of coming to some general agreement on its terms? What do you think, Mr. Bishop?

Mr. Bishop: Your Honor, I have no doubt in

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

my own mind when questions arise like that. I think my opponents are properly protected by an order that states that this inspection examination proceed under a special master and any document that comes up, any objection that we have by way of confidence or by way of privilege or by way of relevancy, they still are not deprived because then it comes back here very quickly for reference and then the court, as far as that is concerned, will have the documents before it, whatever the contents are, and if the court still feels it is confidential can describe it sufficiently without divulging the information so that the Appellate Court knows whether or not this court abused its discretion or not.

The second thing that I am very mindful of, and that is possibly where there was some divergence of opinion about the [10] contents of the order, I stated that I didn't think at this time, for instance, that they had a right to inspect the individual file of every building and loan association in our Eleventh District. They take exception to that.

Again I waived the point by saying this: All right, if at that point, and we have examined the file ourselves, each document as the inspection proceeds, we still want to persevere in our objection, then it is settled and brought here. But I don't believe they have a right at this stage of the proceedings to go into every association's file. I don't object to them going into their own files and our bank files as long as it isn't confidential or privileged or there is some other objection, materiality, but I think it is manifest right now, to give them a

carte blanche order for every association is too great a burden, for one thing and, in the second place, none of us could answer the question itself.

I am convinced that we can't pick out and designate any file title as not being open to them now or being closed to them because by the very nature of filing system in the bank it becomes manifest that this stuff got in that file and that stuff got in this file.

The Court: And they interlock as in other banks?

Mr. Bishop: Yes. I am not quarreling about that, but I think there should be some safeguards left to us here.

The Court: I doubt if the issues that are raised or [11] could be raised under the pleadings that stand in the case would make it material to go into every association's file. I can see where there might be something material involved in an association's file, that is to say, if Fahey wrote a letter to Ammann and said, let us go and do the same thing to Joe Doakes' association in Phoenix as we did to Long Beach, and that letter was in the file, why that would be material.

Mr. Bishop: As showing a course of conduct.

The Court: Yes. But if it is just the ordinary course of business with that association, I do not see how that could possibly be affected or could affect the issues in this case.

Well, my question still is: Do you think you can agree on the general terms of an order?

Mr. Bishop: While we are discussing this, there

was another matter that came up, that is, because of the widesweeping nature of their desires I did not raise it in the previous order. Possibly I was remiss. But since that was solely for the purpose of determining what we did have to deal with, I didn't, but now the question of cost should be settled because this is going to be a very expensive thing, as can be seen by the report that is filed here. If they are going to have us, as indicated, examine every document in every file that is in the three offices of the bank, this is [12] going to go on for weeks and I think this court has the power at this time—I don't say to assess the costs against them—but determine what costs shall be assessed against them under Rule 34 in the event that they are the losing party in this litigation.

In other words, it is going to necessitate, we will say, two or three clerks around each office quite a lot of their time each day. It has already. It is going to necessitate travel expenses. It is going to necessitate reporter's charges.

The Court: That seems to me to be fair, if they are the losing party that the cost should be assessed against them.

Mr. Bishop: I think this court has the power to include traveling expenses in this order.

The Court: Of course that would also be vice versa.

Mr. Bishop: Yes, that the same thing would hold true to the other side.

The Court: That is, that you pay their costs.

Mr. Bishop: That is correct. So I think some

guide at least should be established as to what those costs will include because we haven't a complete guide under Rule 34 about it, but that is what is meant when somebody wants to go—pardon me—on a wild fishing expedition, it does become pretty important I think as well to them as it does to [13] our clients.

Outside of that I don't see any particular argument.

There was one other question that came up—I am speaking I think collectively for all of us—some of these frauds are out, and the court may guide us, instead of jumping all over the place I do think the special master's powers at least should be extended under this order to include some power of examination. By that I mean that some witness might testify that there is such and such a file and this is the record of such and such a bank and that that is all the files that we have to the best of that person's knowledge, and that no records have been destroyed, other than have been shown that were destroyed under such and such conditions. In other words, that there has been no concealment arising out of this litigation, because it has been bandied around, and we would just be going back and taking witnesses' testimony over and over again. I don't mean to have to take their depositions, but anybody up there now from here on should be under oath.

The Court: I would think so. Of course then it goes by way of a deposition. It becomes a deposition.

Mr. Bishop: It can't be both.

The Court: Cannot you agree as to that?

Mr. Westover: Your Honor, please, I thought we had the last point pretty well worked out this morning, that that [14] power be given to the special master to administer the oath in so far as he deems it necessary. I mean by that, to identify files and things of that nature.

The Court: You are not going to have a reporter present all the time, are you?

Mr. Westover: Well, there should be somebody to take some kind of a record, if we started into that, otherwise you will have—maybe it won't be a court reporter, but at least someone who can contribute something sufficiently satisfactory so the special master can have the party identify the sealed documents and things of that nature.

The Court: It would seem to me that that would run your costs up monumentally, but your inspection could go ahead with the master and with the party under oath, the clerk or whoever it is, and you only call a reporter when you have a dispute. Then you would formulate your objection.

Mr. Westover: That is right. That seems to be agreeable.

Mr. Walker: It might be possible to maintain an informal transcript such as we did in these preliminary hearings.

The Court: Even with a transcript here you are going to run into tremendous costs on that.

Mr. Walker: With the exception of San Francisco. In San Francisco it was prepared by a court reporter employed by the San Francisco Bank, but

on two other instances I [15] simply had my secretary present and we maintained this informal transcript. I think the same policy could be followed because I will need her assistance probably anyway with the number of people that are involved.

The Court: In other words, she could just simply transcribe the parts agreed to from time to time?

Mr. Walker: Yes. And if the case arose to identify something, then it would go on the record, but the rest of the time she would be simply working with me.

The Court: Do you think you can agree, Mr. Bishop, on the form of an order?

Mr. Bishop: Yes, your Honor.

The Court: Then why not go back and go to work on the order?

Mr. Bishop: We are already having a rough draft typed up. [16]

* * *

December 2, 1948—2:00 P.M.

Mr. Bishop: May I address the court?

The Court: Yes. May I have a copy of the proposed order?

(The document referred to was passed to the court.)

Mr. Bishop: All of our difficulties as to form have been substantially resolved except one. The order no longer appoints a definite or designated firm as accountants to make the inspection, but it

does permit the plaintiffs to have their auditors make an inspection.

Since the question has been raised, it is manifest, and as has been represented by counsel that they desire to inspect each and all of the books of the bank, that would mean an inspection of the records pertaining to the whole 300 and some associations, and therefore when it comes time to tax the costs in this matter, since they are going on this fishing expedition, I believe that there should be some limitation in here about costs of that character. An audit of all of our books or an inspection that way is a tremendous task and the costs we are confronted with would be tremendous.

The Court: What is the statement in here concerning costs? I see it. Page 8, line 9.

That leaves the whole matter of costs open.

Mr. Bishop: Yes, sir. That is my point exactly. If [3*] we are going to incur that cost just for an inspection——

The Court: I do not know whether you are going to incur it or not. As I read it, this whole matter is open. Suppose they go in and do find a lot of things by virtue of the audit as a result of which judgment is given against the bank. Then at that time either I, if I am still here, or whichever judge is sitting, will have to determine whether or not the cost shall be assessed against you or them, that is, the matter of the assessment of costs.

Is there anyone who has a different understanding about this? The matter of costs is left open.

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. Chapman: Yes, your Honor.

Mr. Bishop: My point is just for inspection at this time, to go to that expense when the court may eventually on a pretrial or trial—we may as well have a firm of auditors appointed by the court now that will make an audit that will be complete and satisfactory in all respects. I would rather spend the money and obtain it for the purposes desired than to spend the money twice.

The Court: Your point is that you would prefer that in view of the fact that the matter of cost is left open that the court appoint a firm of auditors to conduct this investigation?

Mr. Bishop: Yes.

The Court: How long will it take to make an audit? [4]

Mr. Bishop: I don't know.

The Court: Mr. FitzPatrick, can you tell us?

Mr. FitzPatrick: I was going to remark that an audit may not be necessary at all.

Mr. Chapman: That is what I was going to say.

Mr. FitzPatrick: An audit is a very expensive thing, as Mr. Bishop points out. All we want is the right of accountants to inspect the books and tell us—we are not accountants ourselves—what materiality the entries therein show.

The Court: I think that is sufficient. I think if it becomes necessary to make an audit that that matter can be taken up later.

In other words, the notion I had about an audit is that they should be able to take their auditors

along because there may be a lot of entries that will be meaningless to anyone except an auditor.

Mr. FitzPatrick: That is correct.

Mr. Bishop: That is why I believe there should be some limitation in here as to how far that is to go because I believe it is indicated that it isn't apparent at this point whether it is material.

The Court: Where does it provide about auditors in here?

Mr. Bishop: It is derived indirectly, your Honor, beginning at the bottom of page 5.

Mr. Chapman: Line 26, your Honor. [5]

Mr. Bishop: It goes over to the top of the next page.

The Court: Yes, I see. That is pretty broad. Under this, accountants designated by the Federal Home Loan Bank of Los Angeles and the Long Beach Federal Savings and Loan Association may, and are hereby authorized, to examine, inspect, copy or otherwise reproduce the documents and records kept by or now in possession of the Federal Home Loan Bank of Los Angeles, and so forth.

How would you have it limited?

Mr. Bishop: My suggestion would be that the court fix a predetermined amount at this time that can be expended by way of auditing fees for merely an inspection.

The Court: I would not attempt to do that. You went all through the Hearst litigation, did you not?

Mr. Bishop: Yes.

The Court: Well, when I got through fixing auditors' fees on that they ran—I do not recall, but

some colossal figure, \$80,000, \$100,000, or something in that amount.

Mr. Bishop: May I make another suggestion then, your Honor? It may be the limitation that I am looking for in this, or I believe it has been indicated that it isn't manifest at this time to the court that they have the right to go into the affairs of all the individual associations.

The Court: That is going to be one of the jobs of the special master, and judging from the preliminary report I [6] doubt if there is going to be much difficulty in connection with the matter because he pointed out that there was the fullest cooperation on the part of yourself and counsel and officers and everybody in connection with the bank. I am sure that counsel for the plaintiffs here, some of whom have been in this litigation for a long, long time, probably do not want to burden themselves with a lot of matters like that. If there was some way that I could see where I could limit it, that would be one thing, but I cannot do it. If I had wanted to inspect the books I would want an auditor along with me, and I cannot conceive of how I can limit it except to depend upon the reasonableness of the parties and the urbanity of the special master.

Mr. Bishop: Well, since the order now preserves the right of at least giving me the opportunity to object before the special master, why I may be satisfied.

The Court: Not only before the special master, but as well before the court. In other words, if he cannot resolve it, whatever objections there are will

be preserved and it may be that you will have to have an interim hearing in connection with objections. I do not anticipate that you will be coming down here from time to time or day to day or week to week on the matter of trying to settle things, but that they can be accumulated and presented in some more orderly fashion than that.

Mr. Bishop: Thank you. [7]

The Court: So if you will have the order approved as to form by counsel and submit it I will read it over. There may be some changes that might occur to me.

[Endorsed]: Filed January 31, 1949. [8]

* * *

January 31, 1949—10:00 A.M.

* * *

Mr. Walker: There was one other matter in connection with this case, your Honor.

Mr. Chapman: The Special Master was directed to report to you on January 30th as to the result of some very complicated inspections of the books of the San Francisco Bank. Copies were to be made, etc.

Negotiations for settlement have been almost incessant since that time. Our principal officers have been in Washington, D. C., I have been in Portland, we have been all around the place, and it has been impossible to proceed with the inspection, and it was also a very expensive task which might have

been rendered unnecessary if the settlement is successful.

I therefore am filing an application to extend the time of the Special Master's Report until in April. If we do settle it, the inspection will be unnecessary. If we don't settle, it is a vital element of the litigation. [17*]

The Court: Very well.

(The document referred to was passed to the court.)

The Court: When did Portland, Oregon, get to be a thousand miles from California?

Mr. Chapman: "Long Beach" should have been in there.

The Court: Very well. You may have your order.

Mr. Chapman: Thank you. [18]

* * *

March 22, 1949—10:00 A.M.

* * *

The Court: Will you be able to proceed and conclude today? What do we propose to do? In addition to the matter that I have called there is also notice for hearing this morning the petition of the Special Master, hearing on second interim report of the Special Master and petition for partial interim allowance and fees.

Are there any appearances here other than those that I have called with relation to this matter? (No response.)

* Page numbering appearing at top of page of original Transcript of Record.

Very well. I think probably we will proceed with that first.

There has been an accounting? The accounting has been filed, has it?

Mr. Walker: The accounting has been filed, your Honor. The time for objections has been extended.

The Clerk: Do you remember what date that was filed? [11*]

Mr. Chapman: My suggestion would be about September or October of last year, 1948. You can probably tell it by the photostats about four inches thick.

The Court: Maybe it is attached here.

Mr. Chapman: No, that is something else.

Your Honor, the suggestion has been made that perhaps we can proceed with the stipulation which has been the result of so much effort this last week.

The Court: Is it signed?

Mr. Westover: No.

Mr. Chapman: We have brought it here and copies have been circulated.

The Court: I read it through this morning before I came on the bench.

Mr. Holmes: It is satisfactory. We are in position to sign, your Honor.

Mr. Chapman: Some of the parties only arrived just before court opened, your Honor, which prevented it being signed before.

Mr. Angell: You have the originals, Mr. Chapman?

Mr. Chapman: I would like to have a signed

* Page numbering appearing at top of page of original Reporter's Transcript.

copy for my file. I don't know how many of the others would care for it.

The Court: Do you have the originals?

Mr. Chapman: Yes.

The Court: There appear to be two documents here, Mr. [12] Walker, one of them bound with a cardboard back. It says "Home Loan Bank Board Examining Division, Report of Examination and Audit of Conservatorship as of the Close of Business January 24," and this other photostat is dated May 20, 1946, reciting that Mr. A. V. Ammann at the opening of business took possession—this is the inventory, I guess?

Mr. Walker: I believe it is.

The Court: One is the inventory and the other is the auditing report and accounting.

Now have there been exceptions to this accounting filed?

Mr. Walker: Because of the pendency of settlement negotiations, your Honor, the time has been extended from time to time for filing such objections.

The Court: Very well. Proceed.

Mr. Walker: May I say first, your Honor, that the report includes proceedings under Rule 34 for discovery, which involved proceedings in Los Angeles, San Francisco——

The Court: That is your Master's interim report?

Mr. Walker: Yes—and the Portland office of the San Francisco Home Loan Bank. I felt that I should include it in my report.

However, I will ask at this time that it be not considered in any fee application. In other words, I would like to defer my request for fees on that account until later because of disputes which might exist among the parties as to whom it [13] might be assessed, and so forth. I think that could be covered in the final settlement which appears to be progressing towards a close.

The report will show completion, subject always of course to the accounting, of the turn-back of the various assets of the Long Beach Association to its officers and directors. It will show the completion of the election which was required by the order of court and the various parties, persons, who were elected as directors and as officers of the Association. The work required by the order for return of the Association has been completed except the final account.

So far as the final account is concerned, as I said before objections have been deferred because of the pendency of settlement negotiations. If the case is settled, it will settle also the final account without the necessity for extended hearings. For that reason I have participated in many of the negotiations between the parties in an attempt to bring about in that manner a settlement of the accounting.

The work in the special mastership has included, as of the day after tomorrow, exactly fourteen months.

The Court: Has it taken your entire time?

Mr. Walker: Practically my entire time. There have been lags occasionally when services were not

required. But during that period I have been to Washington three times, I [14] have been to Salt Lake City, I have been to Portland, I believe once to San Francisco—all involving one or another phase of the turn-back and settlement of the accounting.

The Court: You have not kept a record of your time spent by hours?

Mr. Walker: I have not kept an hour-by-hour record of time, no. I would say at least 90 per cent of my time during the past 14 months has been spent in one phase or another of this case.

The Court: In performance of your duties as special master?

Mr. Walker: In performance of my duties as special master; yes, sir.

The Court: What fee are you asking for now? There is none indicated in your request.

Mr. Walker: There is none indicated in my prayer, your Honor. In suggesting a fee there are a number of factors which must be taken into consideration. I am sure no one but the court and the various attorneys who have participated in this matter could be cognizant of the acrimony or disputatious nature of the entire matter. I am sure all of those who have participated in it are fully aware of it.

The matter has involved sums of money which are a little unusual in the average lawsuit. There is an Association with assets allegedly around 26 million dollars, claims involved [15] in the accounting which are asserted in other pleadings in the case

amounting to several millions of dollars; a public institution involved where the confidence of a community and the confidence of its shareholders is vital to its continued existence.

The manner and method of the turnover I believe fully justifies the order which your Honor made in directing how it should be done. These matters were considered at the time of my first interim report. Perhaps it is repetitious to go over them again here. The turnover was about as smoothly conducted as anything I could imagine. The cooperation of all parties was fine. Confidence in the institution is maintained and that is shown in the increase in the shareholdings of 6 or 8 million dollars. Is that figure approximately correct, Mr. Chapman?

Mr. Chapman: In the neighborhood of 7 million dollars.

Mr. Walker: Since the turn-back was finished.

I am an attorney, and I guess that applies also to special masters, who probably never are paid for the ulcers which may develop from sitting on a powder keg for an extended period of time, but I think that perhaps should be taken into consideration, too.

The deflated dollar, high income taxes—there are many factors. To cut it all short, I would suggest that a fee of \$50,000 would not be exorbitant. [16]

The Court: An interim allowance of \$50,000?

Mr. Walker: No. There has been an interim allowance of \$20,000.

The Court: You are suggesting a total fee?

Mr. Walker: A total fee to date, your Honor,

and I am suggesting that fee to date rather than an interim allowance for the reason that I think it would be helpful if a fee were established and fixed so that it would not be open to conjecture and question in the further negotiations to come. I am satisfied that the case will be compromised and settled within the next few weeks.

In other words, I would suggest as a total fee that figure. As to suggesting what an interim allowance would be, naturally I would like as much of it as possible.

The Court: Do you have any evidence to put on as to the reasonableness of that figure?

Mr. Walker: No, your Honor, I have not. I once had the happy experience of making Judge McCormick an expert witness in another matter. I think the court probably is the only one who can determine the value of the services. I am not prepared with experts on it. I know of no case which has been as involved or as complicated or in which so many factors had to be considered as this.

The Court: I do not know about the court, because we sit on those same powder kegs and get those same ulcers for a [17] lot less money.

Is there any one of the parties or their counsel here that has anything to say in connection with the Special Master's interim report? (No response.)

Is there any objection to the interim report as it is now filed? There is none filed in writing. (No response.)

Is there any objection at all?

Mr. Chapman: I think the only thing, your

Honor, was the statement that Mr. Walker just now made—and it is not in the report, as I understand it—that was that the turnback of the assets to the Long Beach Association had been completed. I think if his statement is limited to the assets which were in the Association at the time Mr. Ammann returned the Association to its officers and directors, the statement is correct. But it is my recollection there is quite a few millions of dollars still in court which we think may be court assets if we don't settle the case.

With that one exception—and then there is the question of the San Francisco Bank Stock and the Los Angeles Bank stock—I have no objection to the report as filed on behalf of Long Beach.

The Court: I had understood Mr. Walker's statement to mean that there had been a turn-back of the physical assets and properties and evidences of property at the home office of the [18] Association.

Mr. Chapman: That is as I understood it, your Honor.

Mr. Walker: I will certainly accept Mr. Chapman's suggestion. It is entirely correct. I thought I had covered it by saying "subject to final account."

Mr. Westover: There is just one thing, Mr. Walker. There is a bond mentioned in your petition. I take it that that has been filed with the Clerk of the court, the former conservator's bond?

The Court: The \$100,000 bond of Ammann?

Mr. Westover: The Home Indemnity Company bond No. M-72239.

The Court: There is in the possession of the Special Master the bond of Ammann in the sum of \$100,000.

Mr. Westover: That is why I wonder if it would not be appropriate to have it filed.

The Court: This bond will be filed simultaneously with this report with the Clerk. Did you file it?

Mr. Walker: That is what I am wondering, your Honor. I am a little in doubt. Some little time elapsed between the preparation of that and subsequent to it I had numerous discussions with Mr. Chapman over the bond. It was my intention to file it. I am just wondering if I slipped and did not file it. It can be filed at any time if the court desires.

Mr. Chapman: If it has not been filed, you will file it? [19]

Mr. Walker: I will file it immediately.

The Court: Very well.

Now as I understand your request, it is that a total fee of \$50,000 be fixed for your services not only in connection with the turn-back and the election, but also in connection with your services as special master on the discovery proceedings?

Mr. Walker: Well, I had asked that the discovery proceeding portion of it be deferred, your Honor, for the reason that it might lead into some contention with the Home Loan Bank of Los Angeles and the Home Loan Bank of San Francisco, which I didn't feel need come into it at this time. The amount of such services would be, I would say, relatively small, about three weeks work involved.

The Court: Very well.

Mr. Westover: Might I ask your Honor to clarify this so that we may understand it?

Does Mr. Walker have in mind that the assistance he has given in connection with the negotiations for settlement, the trips to Washington in February of 1948, and I think there was one trip to Salt Lake, according to your petition, in connection with the settlement, are those included in the present petition and under consideration by the court?

Mr. Walker: Yes.

Mr. Westover: It is only the preliminary inspection of [20] the San Francisco books.

Mr. Walker: That is all.

The Court: Has anybody else anything to say?
(No response.)

I will submit the matter.

[Endorsed]: Filed July 8, 1949.

* * *

January 27, 1950—10:00 A.M.

(Proceedings had at the offices of the Los Angeles Branch of the Federal Home Loan Bank of San Francisco, Fifth Floor, Chester Williams Building, Los Angeles, California.)

The Court: Very well. We will get the appearances here. We will go right around the table.

Your name, sir?

Mr. Priest: Mr. Priest of O'Melveny & Myers.

Mr. FitzPatrick: Richard FitzPatrick.

The Court: Mr. Whyte.

Mr. Angell.

Mr. Fitting.

Mr. Bishop.

Mr. Dusenbery.

Mr. Gilbert.

Mr. Chapman.

And Mr. Westover.

Is that all the appearances? (No response.)

And they each represent their respective parties that they have heretofore appeared for in the record.

And the special master is here also.

The Court has convened here this morning in connection with the reference to a special master for discovery proceedings on the motion of the plaintiffs in connection with the [5*] records of the San Francisco Bank. At the conference in chambers the other day it was indicated by all parties that it

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

might be helpful in the expedition of the matter if I were to come here and sample copies of the various records about which there seems to be some controversy, that they might be submitted and a determination made, if possible, as to whether or not they were inspectable at the present status of the proceedings.

I wonder if anyone has here a copy of the motion for summary judgment by the San Francisco Bank?

Mr. Bishop: I have, your Honor.

The Court: And a copy of the motion for summary judgment by the ten northern associations?

Mr. Bishop: No, not those.

The Court: The discovery is made in connection with that. That is the motion for discovery. Do you have a copy of the motion for discovery and the supporting affidavits that were made in connection with the motion for summary judgment of the San Francisco Bank?

Mr. Bishop: This is the notice of motion and supporting documents for Rule 34 proceedings. And that is a copy of it.

The Court: That is the summary judgment of the San Francisco Bank?

Mr. Chapman: I have the documents, your Honor, for the ten northern associations by their 80 officers. [6]

The Court: Very well.

Mr. Chapman: We will have these back after the hearing?

The Court: Yes. I will give them back to the clerk and he can redistribute them.

And the motion for discovery.

This is the motion for the production of documents.

Mr. Bishop: Under Rule 34.

The Court: Yes. That is the plaintiff's motion.

Mr. Bishop: And there is nothing in that motion relating to the motion for summary judgment.

Mr. Chapman: I would like to challenge that.

The Court: Let me see your motion for summary judgment.

(The documents referred to were passed to the court.)

Mr. Chapman: I have a copy, your Honor.

The Court: Now, the preliminary report of the special master, may I have that?

Mr. Bishop: Here it is, your Honor. Maybe we had better put our initials on these documents?

The Court: The clerk is writing everyone's name on each document as he receives it.

Mr. Bishop: That is fine.

The Court: Now, where is the order for inspection?

Mr. Chapman: The preliminary order or the second one?

The Court: All of them.

Mr. Bishop: Did you want to see our original opposition [7] to Rule 34 with points and authorities?

The Court: Yes, let me see that.

Mr. Chapman: This is the order for preliminary inspection, your Honor.

The Court: If I understand correctly, many of the files indicated in the special master's preliminary report, which was filed and which is dated November 26, 1948, I believe—that date indicated on here—that were then in San Francisco and Portland, have since been moved here, or does that report still correctly state the records that are in Los Angeles?

Mr. Bishop: No records as such have been moved between the various offices, the three offices, except in the ordinary, regular and usual course of business. Substantially they are the same.

The Court: Then what I should be concerned immediately with are the reports that are in the Los Angeles office, as indicated by the special master's report.

Mr. Gilbert: Yes. If your Honor would refer to Exhibit K of the special master's report, that document is identical with Exhibit No. 1 in these proceedings, and sets forth on pages 8 and 9 of Exhibit K the documents which were first designated by the parties for examination and to which objection has been made. That probably will be the first order of business, I would assume. [8]

Mr. Chapman: That would be pages 55 and 56 of the report.

The Court: Yes. In any event, we are not and cannot be concerned today with the matter of the immediate inspection of documents which this report indicates were then kept, and still are, in both San Francisco and Portland.

Mr. Chapman: That is correct.

Mr. Gilbert: That is right.

The Court: Which one of your designations, Mr. Walker, shows the records in Los Angeles? Is that Exhibit K?

Mr. Walker: I believe it is K.

The Court: Headed "List of Files and Records in the Office of the Los Angeles branch of the Federal Home Loan Bank of San Francisco."

Mr. Walker: I have a supplemental list, a list of documents which have been requested and to which access has been refused here.

The Court: If you will hand that to me. Now, just a minute. I have one more document to read. As I recall, after the special master filed his preliminary report there was a further hearing in court which resulted in the order filed December 2nd, and signed December 2nd, 1948.

Mr. Chapman: That is correct.

The Court: That is the order under which we are here proceeding? [9]

Mr. Chapman: That is correct.

The Court: Mr. Bishop stated a moment ago that in the motion for inspection no statement was made concerning the motion for summary judgment. That may well be so. But nevertheless at the time of the hearing of that motion I recall distinctly that the point was made that the inspection was necessary in order for both the Los Angeles Bank and the plaintiff association to properly op-

pose that motion, and from time to time the court has continued the hearing on the motions for summary judgment, and my recollection is that upon either each or various of the occasions, if not upon all of them, indicated that it would have to be deferred, first in view of the settlement which did not materialize and, secondly, until the completion of the discovery proceedings. [10]

* * *

Mr. Walker: Then all of the files listed here, LA-10 to LA-35 inclusive have been produced, sealed and are subject to your ruling as to their accessibility.

The Court: Mr. Walker, as special master, you have been sitting in on this; it is not my purpose and intent to sit throughout this inspection.

The docket and the calendar of the court won't permit it unless I am to completely abdicate my position as to all other litigation and all other litigants. Perhaps you can suggest at this time samples of files which might be submitted to me in order that I might make some indicative ruling to expedite the inspection and at least look forward to some ultimate day when it can be concluded.

Mr. Walker: To the general group of supervisory files, I believe that will have to be developed by evidence.

The Court: Where are they designated here?

Mr. Walker: The only supervisory file is LA-12.

The Court: You said there were three classes:

one, the collateral, two, the supervisory files and, three——

Mr. Walker: Just the bunch listed from LA-10 to 35 there. Objection was made to all of those. They do not fall into a class, however. They are each independent.

Mr. Westover: This is simply a list of the actual exhibits that have been stamped. This does not purport to be a list of the items requested to be inspected. [17]

Mr. Walker: That is right.

The Court: These are the items which have been requested to be inspected which he has reached up to this time?

Mr. Westover: I beg your pardon, that is exactly what I was afraid of; at least not according to my understanding is it that way. There have been a great many items requested on which examination was refused.

The Court: In addition to these?

Mr. Westover: Yes, which are not on this list at all. This is only the exhibit list.

Mr. Walker: We simply have not been able to get all of that on the record.

In other words, we are trying to take a big swallow instead of a bite at a time. Request has been made, or designations have been made, of all of the supervisory files. Access to those has been generally refused, but the individual files have not yet been produced to me for sealing. [18]

* * *

Mr. Bishop: Could I present for your consideration, first, the collateral control file which may be the answer without having to examine all those? They don't have to have the name of each party.

The Court: I just want to see file No. 119, to see the shoals——

Mr. Bishop: Well, I guess I look like an ambulance attendant with this. I don't think this is a cadaver yet.

The Court: This drawer which Mr. Bishop has wheeled in to me—what is it?

Mr. Bishop: It is a steel drawer and standard filing [40] cabinet.

The Court: The tab at the end is indicated "Arizona," and underneath that "Phoenix."

This drawer is 119?

Mr. Bishop: Yes, sir. That contains all the collateral, notes, trust deeds and mortgages of just that one organization.

The Court: I see that there are 14 folders in it. What is the key or system for the folders?

Mr. Bishop: They are filed by loan number.

The Court: They are all by loan number so if I take one of these at random—Mr. Noon, if I take one of these at random it will be a sample of what is in all of the other 14?

Mr. Bishop: Except one other clarification. Some are GI loans, some are Federal Housing loans and some are conventional loans.

The Court: Are these marked GI loans those which are GI loans?

Mr. Noon: That is right?

The Court: Let's take one at random here that is not too big.

Here is a little one. This is marked "First Federal Savings & Loan of Phoenix," and there is a key number on here that appears to be—well it is the second file in the book.

Mr. Chapman: As your Honor examines the file, may I ask [41] you to see if these are documents that have or have not been recorded? I did not have a chance to examine them and do not want to make any assertions.

The Court: All right. Now, I will state without disclosing the name of the party, I have here what is referred to as Loan No. 1752. On the face of the principal note it is in the sum of \$4000 and is dated August 27, 1941.

Payable in monthly installments of \$36, payable on the 27th day of each month beginning December 27, 1941, at the interest rate of 6.6 per annum. Delinquency at the rate of 7.6 per annum.

It is signed by two parties who I would guess, from the similarity of their names, are man and wife, and giving a street address.

On the back are two rubber stamps, one a little square one with the initials "T. E. C." And also the letters "FHL-BB."

There is a large rubber stamp, "Pay to the order of Federal Home Loan Bank of San Francisco,

First Federal Savings & Loan Association of Phoenix." It has two signatures on the back, "George E. Leonard, Vice President," and the signature, "Agnes Krogh, Assistant Secretary."

Also imprinted in it is a seal, "Phoenix First—" something or other.

Attached to it is a loan number in pencil, 1752, and a [42] document entitled "Realty Mortgage," bearing the same date and covering property described, "In the County of Maricopa, State of Arizona," and acknowledged by the makers. Also appears a rubber stamp on it, again inspected by "T.E.C." Also the letters again, "FHLBB," and on the title side it is indicated to be a realty mortgage from blank to First Federal Savings & Loan of Phoenix, filed and recorded at the request of the Phoenix Title and Trust Company, August 29, 1941, at o'clock 9:00 a.m., book 341, then the letters "NTGS," at page 33, and then a rubber stamp.

"Roger G. Laveen, County Recorder, by Milo Le Baron, Deputy Recorder." Also appears the figures "4:55" and a verification, "State of Arizona, County of Maricopa, ss:

"I, Roger G. Laveen, County Recorder in and for the County and State aforesaid do hereby certify that the within instrument was filed for record at 9:00 o'clock a.m. on this twenty-first day of August, 1941, and duly recorded in book No. 341 of NTGS records of Maricopa County, Arizona, at page 33.

“Witness my hand and official seal the day and year first above written.

/s/ “ROGER G. LAVEEN,

“County Recorder.

“By BLANCHE DAVIS,

“Deputy.”

And reading further on this document, “When recorded [43] return to First Federal Savings & Loan Association of Phoenix, 30 West Adams Street, Phoenix, Arizona.”

Well, glancing through this file hurriedly, it seems to be nothing more or less than a file containing a series of similar documents and they all appear to have been recorded and certified and the affidavit of recordation.

Mr. Chapman: Since Your Honor has provided the information, I would like to make the additional point that even with the Supreme Court decision we have cited and the fact that we think nothing could be confidential, that it would be somewhat difficult for a document affecting real estate, which has been made a public record, to be confidential against the stockholders of the bank.

The Court: In the middle here is a pink tab. It says, “First of Phoenix.”

That is just for convenience and does not contain any division, isn't that right?

Mr. Noon: That is right.

The Court: I will take a GI loan here. From an examination of this, the number which I read indicated in pencil on that first one, which was No. 1752.

they appeared to be filed in this drawer numerically, from the lowest in the front on up.

Well, I have taken at random here what is called a GI file and again without disclosing the name of the makers— [44] it is punched here. I guess that is a loan guarantee certificate, bearing No. "VA Loan 4835L-07LH-G-2616 Arizona," to lending institution printed name and address, "Federal Savings & Loan Association of Phoenix. Date of this certificate, May 20, 1947. Date of loan 4-9-47.

"Amount of loan \$675, Section 505. Full name of veteran, last, first and middle."

That is typed in.

"Serial No. N 811 0891. Escrow to earmark: None.

"Printed subject of Serviceman's Readjustment Act of 1944, as amended. Public Law 268, 79th Congress and regulations issued thereunder to the date of this certificate, 100 per cent of the indebtedness outstanding from time to time under the loan identified above is guaranteed.

"Administrator of Veteran Affairs, by John D. Anderson, Phoenix, Arizona."

Then there is a rubber stamp, "John D. Anderson, acting loan agent."

Then over here it reads, "Veterans Administration Form 1946-4-1949. U. S. Printing Office 1946-O-683668-415."

There is a rubber stamp on there, a circular one, "Inspected T. E. W."

Here is another stamp, "PHLBB." There is nothing on the back.

Attached to it is VA Form 4-6301A, Home Loan, August, [45] 1946, use optional.

Then it reads here, "Serviceman's Readjustment Act 38USCA694A, acceptable to RFC Mortgage Company."

Typed in is, "Escrow 65677-DEC-ML." Then printed, "Arizona," written in ink, "Loan No. 4835, Mortgage Note. Dated Phoenix, Arizona, April 9, 1947, in the amount of \$675," and signed by two parties. Then there is some further reading on here, "This is to certify that this is the note described in and secured by mortgage on real estate situated in Maricopa County, State of Arizona. Dated 15th of April, 1947.

"Dorothy Cushman, Notary Public," with seal.

On the reverse side is a rubber stamp in the same form as on the other loan, "Pay to the order of the Federal Home Loan Bank of San Francisco. First Federal Savings & Loan Association of Phoenix, by C. Oscar Nelson, Vice President, and John C. Potter, Assistant Secretary."

Attached also is a mortgage with the Form Number, "VA Form 4-6301A, Home Loan, August, 1946, use optional, Serviceman's Readjustment Act, USC," and so forth. "Acceptable to RFC Mortgage Company."

Then the following form, "Mortgagor conveys to the mortgagee forever the following described premises lying and being in the County of Maricopa," and then there is a description. [46]

It is signed at the end and dated the 9th day of

April, 1947. Across the face of the document appears a rubber stamp and other information.

"I hereby certify that the within instrument was filed and reported at the request of the Phoenix Title and Trust Company, April 18, 1947, at 9:00 a.m. in Book 442 mortgages on pages 217, 218, 219. Witness my hand and official seal," and other pertinent information on there as to the county recorder. Perhaps I had better read that.

"Witness my hand and official seal the day and year aforesaid, Roger G. Laveen, County Recorder, by Paul A. Thomas, Deputy Recorder."

Now, glancing through this file, without an examination of each one, they seem to follow the same sequence, a loan guarantee certificate and mortgage and note; a mortgage to have been recorded. I have seen all I want to see of that file. [47]

* * *

The Court: The file that I first examined contains 25 sets of notes and mortgages. The numbers are not indicative, that is, the numbers typed on here are not indicative of the number in this file because I see the first one is 1752 and the next one is 1759 and the next one is 1768.

All of these in this file are dated in either 1941 or [49] '42.

Mr. FitzPatrick: The young lady has informed me that the record you have there shows the total number of pieces in that drawer.

Mr. Chapman: Did I hear your Honor correctly that all of the trust deeds are dated 1941 and '42?

The Court: All these in the file that I picked at random and examined.

Mr. Chapman: That would be prior to the LA Bank seizure.

The Court: That is correct. It would appear to me that in any event it would not be necessary, if you are only interested in the changes to examine trust deeds and notes prior to the date of the seizure.

Mr. Chapman: That is the only kind of notes and trust deeds that could be in existence to be assigned to the Los Angeles Bank. They would have had to be in existence before 1946 to be the subject of collateral.

The Court: That is correct, but what they have and are assigned they have. Any changes that they have made, that is to say, if there has been any substitution of any other collateral for the collateral that existed on that date and any loss or gain would be reflected in notes and mortgages and collateral subsequent to that date.

Mr. Chapman: Not necessarily. Speaking only from our [50] own Association, and I have had no access to these books, it is obvious that you don't pledge all your collateral but only enough to pledge the loan that you may seek at any particular date. As the loan balance goes up you need more collateral and as it goes down collateral is released.

The Court: You mean there is a question of whether or not these instruments of collateral in drawer 119 are assigned or merely deposited for safe-keeping?

Mr. Chapman: Not only that question, but the

question of whether these were or were not assigned to the Los Angeles Bank, whether they were gotten by the San Francisco Bank after it was supposedly created or were gotten by seizing this collateral when they took the Los Angeles Bank. And the only way that that can be traced——

The Court: Is by the date of the assignment?

Mr. Chapman: No, the assignments are not dated. That is why we have to go to each one and then check it against their ledger control and some other books. [51]

* * *

The Court: Just a moment. I find here one very long assignment made the 15th of June, 1946, and the form is typed out, with the words "Los Angeles and San Francisco." I suppose that that was a re-execution or an assignment of San Francisco of the loans theretofore assigned to Los Angeles?

Mr. Chapman: That is one of the things we want to know.

Mr. Walker: That can be checked by the collateral ledger sheet to see how many loans were here previous to that time.

The Court: Would not the San Francisco Bank have retained in its file the previous assignment to the Los Angeles Bank?

Mr. Chapman: That is what we hope to [62] find.

The Court: But it is behind the string.

Mr. Bishop: They put it in because they didn't want to go back any further than that date, your

Honor. That was merely for the convenience of all parties.

Mr. Angell: I would like to make this observation, your Honor, that any record made today of the collateral up to secure anything that was there as of the time of the take-over would be absolutely useless for any accuracy purposes tomorrow or the next day or all the time in the future because they are changing all the time, and they are taken out and others put in to take their place, some of them are paid off, notes are paid, and so on.

The Court: It would seem to me that those that were executed prior to the seizure, if they are still retained in the files, would be material and should be examined at the appropriate time. That is, these back of the string.

Mr. Angell: In an accounting action after it has been determined that they have a right to dissolve the San Francisco Bank, it would be quite pertinent.

Mr. Chapman: Your Honor, it might be possible that the Los Angeles Bank would want to replevin some of these instruments. We had the books and records before they took them away from us. It is one of the rights we have at law. We have a right at least to see the records they took away from us to determine what legal remedies we want to exercise as to the [63] material that we claim was unlawfully seized from us. I can't see any ground on which they deny us access to our own books merely because they took them away from us.

These are the records of the Los Angeles Bank that we are asking to see. Now, in the tracing down into the San Francisco Bank—and our motion is directed to all three banks—your Honor says later, some other time. [64]

* * *

February 7, 1950—10:00 A.M.

* * *

Mr. Westover: May we have Mr. MacGuineas' representation, your Honor?

Mr. MacGuineas: I am appearing here, a member of the Department of Justice staff, appearing for the United States in connection with the claim of privilege which was filed in the clerks' office yesterday, copies of which have been served on counsel.

Mr. Chapman: I received mine a couple of hours ago.

The Court: Are you appearing for the United States only?

Mr. MacGuineas: I also am appearing for the so-called "official defendants."

The Court: Very well. [16*]

* * *

Mr. Chapman: I am not aware that the United States was a party to these proceedings.

The Court: It is not. The claim of privilege here is by the United States, but we will get around to that. [17]

* * *

The Court: The Board is asserting privilege as

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

to all supervisory files, as I read this claim of privilege, but as I understand the letter from the Board they are also willing to produce all of the files, the supervisory files, for examination under the broad outline that I have indicated here, except those that they believe are of imminent public interest to remain confidential.

Mr. MacGuineas: I would be happy to explain the position, if this is the appropriate time to do it, your Honor.

The Court: I think it is.

I have read this letter here. The letter is addressed to the Honorable Judges of this court and is on the letterhead of the Housing and Home Financing Agency, Home Loan Bank Board, and it is signed not on behalf of the United States of America, or by—that is, it does not appear—but it is signed by William K. Divers, Chairman. The last paragraph of the letter reads: [23]

“In a spirit of cooperation with the judicial branch of the Government, we are, however, willing and prepared to have a designated representative of ours undertake immediately an examination of these supervisory files and determine, subject to our approval, what particular items in them, if any, may be disclosed without prejudice to the public interest. We are willing that any such items as to which such determination shall be made the subject of the pending disclosure proceedings if otherwise appropriate.”

I realize in making that statement they are still

taking the position that it is their particular approval which determines whether or not the items are inspectable.

On the other hand, as far as the practical matter of getting along with the litigation is concerned, it would seem to me that if that procedure were adopted and inspection made of those files and records by the parties seeking inspection of the documents, they may get all of the information which they may desire or which may be appropriate for them to have, and thus would eliminate the determination of the question at all. Or if they do not do that, they will at least produce particular documents which the Board claims are confidential, privileged and not subject to court order, so that then a case can be made rather than a shotgun proceeding such as [24] this one to rule on this claim of privilege.

I have read it through. It was laid on my desk just after Mr. MacGuineas was brought in and introduced to me early this morning. I read it through before you gentlemen came down. I am not familiar with all of the cases which have been cited. I am, however, somewhat familiar with the general principles, having had some experience with the same question at other times.

In most of these cases I notice the United States was a party, and in most of these cases they are, as I indicated the other day, an effort in private lawsuits to secure information from Government files, which, of course, should not be permitted, that is to say, private lawsuits between individuals and

private parties and not between any agency of the Government or one created by the Government or one under the authority of the United States, such as the Federal Home Loan Bank of San Francisco.

So if the parties could agree to proceed with the inspection on the basis of this last paragraph of the letter, it would, as I have indicated, and if you will suffer me to repeat, either possibly eliminate the necessity for making a ruling—I am not trying to avoid my duty here; I think I have demonstrated that—but it might eliminate the necessity of making a ruling, and if that did not do it, it would at least point it up so that a question could ultimately be determined [25] as to particular documents, because even though the Supreme Court might say that I do not have the right to order them, I can hardly imagine that the judges of the Supreme Court would rule on a pig in a poke and say it is privileged if they have not seen it.

I think I understand your position, Mr. MacGuineas. Have I about correctly stated it?

Mr. MacGuineas: May I state it so that there will be no misunderstanding perhaps afterwards as to the Government's position here?

The Court: Surely. [26]

* * *

Mr. MacGuineas: Perhaps that is the source of the objection.

I am not, however, asserting a privilege on behalf of the Bank. I am asserting a privilege, as I said, on behalf of the executive branch of the Government of the United States. I think counsel and

your Honor ought to know that this privilege is not being asserted for any bureaucratic reason or in any doctrinaire sense of having the fear of anybody stepping on the toes of the Government. It has been a matter considered seriously by the Board itself. It is a matter that has been the subject of serious consideration by the Attorney General's office and the Assistant Attorney General who is responsible for the supervision of this case. The claim of privilege has been filed only because both the Department of Justice and the Home Loan Bank Board have a genuine, sincere, earnest feeling that these files, the files of perhaps any of these associations, do contain material in the nature of information with respect to the operation of the Bank, information as to the personalities involved in the Bank, that information may come through regular examination of the associations by the examiners, it may come perhaps from an employee of the association, it may come from an outsider, it may contain a charge which upon investigation would be proved to be totally without merit, pure rumor or scandalous gossip. [27]

Not only is it important to the successful supervision by the Home Loan Bank Board of these savings and loan associations that it be given all possible sources of information with respect to the proper conduct or the improper conduct of these associations, but it is equally important that any persons who see fit to furnish that information be protected by having that treated as confidential so that there may be no opportunity for coercion or

reprisals or any other inducements placed upon them which would, in the long run, shut off the source of information to the Home Loan Bank Board.

That being the case, the Board is eager to go just as far, and the Department of Justice approves its going just as far, as we conscientiously feel that we can to make material in the supervisory files available to the litigants in this case.

To that end the Board has indicated in its claim of privilege that it will immediately assign a special employee of its to make an examination of the files. I understand that those files are decidedly bulky, that the mere going through those files of the associations would take a considerable time. But in any event the Board is prepared to have that done and to segregate the material and only such material as is in the nature of which I have indicated which the Board deems that it would be genuinely detrimental to the efficient operation of its supervision of these associations will be [28] withheld from discovery. Any other information in those supervisory files will be produced, and will not be objected to unless—of course, I am not now waiving the right to make any other objections, such as attorney-client relationship or that sort of thing. [29]

* * *

I think the order ought to enlarge the powers of the special master. It might, in predication upon the last paragraph of this letter from the Home Loan Bank Board, and reserving all questions of

ruling upon either the claim of privilege or anything else, provide that the inspection should proceed at some designated time, and I think that the Board should designate—I think if they could designate it in time to put it in the order—the names of the parties, that that party would be designated to produce the records before the special master.

Mr. Walker: Can you indicate now who that might be, Mr. McKenna?

Mr. MacGuineas: I think we will have to telephone the Board, but we should be able to get a reply today, and then the person designated can appear in the order.

The Court: I do not think the order need contain much else. You have findings here in connection with your order which, had we been compelled to proceed this morning without [37] the offer made by Mr. MacGuineas, I would have had to pass on. But I do not think that in view of that, that that would be an appropriate time to pass on findings of fact concerning the actual custody of the records. The record will have to speak for itself, and in the event the question does arise why that will be an appropriate time to give consideration to it.

Mr. MacGuineas: May I suggest that it would be appropriate in the recitals to refer to the claim of privilege, that it has been filed?

The Court: Certainly it would. [38]

March 6, 1950—10:00 A.M.

(Other court matters.)

The Clerk: No. 5421-PH, Civil, Mallonee v. Fahey, consolidated with No. 5678.

The Court: Item No. 1, hearing on report of parties herein on progress made in re negotiations for settlement. That will be continued on the calendar.

No. 2, hearing on order to show cause directed to the Federal Home Loan Bank for an order of dissolution, likewise.

No. 3, hearing of defendant and cross-defendant Federal Home Loan Bank for summary judgment, likewise.

No. 4, hearing on motion of defendants Boynton, et al., for a summary judgment—the motion to dismiss I understand was granted in that. It is marked here as still being on the calendar.

Mr. Chapman: The motion to dismiss was granted?

The Court: The motion to dismiss was passed on. It was denied. Mr. Clerk, that was denied some time ago and the motion for a summary judgment will be the matter still carried on the calendar.

No. 5, hearing on report of Ronald Walker, special master, as to how inspection of the San Francisco Bank is progressing, pursuant to order therefor granted 12-8-48.

Ready on that? [3*]

Mr. Walker: Ready, your Honor.

The Court: And No. 6, hearing on motion to approve interim report of special master, filed 2-27-50 on discovery proceedings and accounting re Ammann.

Are you ready on that?

Mr. Walker: Ready.

The Court: No. 7, hearing on petition of special master for interim allowance, filed 2-27-50.

Mr. Walker: Ready.

Mr. Chapman: Your Honor, I obtained 27 pages of objections about 15 or 20 minutes ago, and I think we ought to at least read them, even if we don't read the authorities cited. We will be ready this morning, but it will be a little while.

Mr. Westover: I might say, your Honor, I haven't even received them yet so I don't know what they are.

The Court: Have you received them, Mr. Walker?

Mr. Walker: I have them.

The Court: Have you read them?

Mr. Walker: I have read them.

Mr. Fitting: If the court please, we would like to file the objections of the official defendants to the petition of the special master for interim allowance upon fees, and may the record show that we have served here in the courtroom with copies of this objection Mr. Chapman, Mr. Westover and Mr. Walker. [4]

The Court: He says he has not received them.

Mr. Westover: That is from the Government.

That is only a 2- or 3-page deal. The 27-page deal I haven't received.

Mr. Chapman: I got mine from counsel of the San Francisco Bank.

The Court: Very well. Mr. Chapman, Mr. Westover—

Mr. Fitting: Mr. Walker, Mr. Angell, Mr. Bishop and Mr. Whyte.

Mr. Chapman: May the hour of service be shown, your Honor? I got mine 5 minutes of 10:00.

Mr. Fitting: Between 5 minutes of 10:00 and 10 minutes after 10:00, I would say.

The Court: Very well.

Mr. Westover: May the record show that I am now receiving from Mr. Bishop the San Francisco Bank's objections?

The Court: At 10:15?

Mr. Westover: Yes, 10:15.

Mr. Angell: We are not required to serve that on them. We are only required to serve it on the one who is making the request. We would be glad to do it as a matter of courtesy, but we have filed our objections and served the special master by 10:00, which we have done. I have no more copies, but I will send you one, Mr. Whyte, if it will be satisfactory to you, and Mr. Tremaine, and any other counsel that want them I don't know that they are interested in it. [5]

Mr. Chapman: I think your Honor should be directed to rule according to our local rules which require filing on all parties and the time of filing within 5 days of the motion.

The Court: Yes, that is correct.

Mr. Chapman: I am concerned obviously in the handling of any matter connected with this case.

The Court: There are a great many parties to the proceedings here and I think they are all entitled to service of anything which affects either the issues or affects the deposit of money in court. Naturally, anything that affects the deposit of money in court affects the issues.

Mr. Chapman: I think we can be ready if we have a little time for reading, perhaps in the library.

The Court: Very well. I will mark Item 7 with a question mark then as to whether or not the parties are ready, and take up No. 5 and No. 6 which appear to be practically the same thing, report of the special master on discovery proceedings and accounting of Ammann.

Is that a written report?

Mr. Walker: I believe that is included in my other report, your Honor.

The Court: It is included in the other report?

Mr. Walker: It is included in the other report which accompanied the application for fees.

The Court: Let me see his petition for fees, or whatever [6] it is that you have here this morning, Mr. Clerk.

(The document referred to was passed to the court.)

The Court: The objections are filed. This is the answer of Federal Home Loan Bank. That was filed this morning at what time, Mr. Clerk?

The Clerk: I do not know, your Honor, but it was before 10:00 o'clock.

The Court: This answer of Federal Home Loan Bank, the objections, the 27-page document.

The Clerk: It was filed before 10:00 o'clock.

The Court: Between 5 minutes of 10:00 and 10:00?

Mr. Bishop: No, 18 minutes to 10:00, your Honor. I filed it.

The Court: Where is the Government's objections which they just filed?

(The document referred to was passed to the court.)

The Court: The Government has raised nothing new here except the grounds of jurisdiction which you have heretofore raised?

Mr. Fitting: I believe that is right.

Mr. Walker: I might say that that is the basis of both objections. They are simply seeking to preserve the jurisdiction to the entire proceedings.

Mr. Fitting: Our objection is solely as to jurisdiction.

The Court: All of the matters which have heretofore been [7] raised and I have passed on?

Mr. Fitting: Yes, your Honor.

Mr. Walker: The objections of the Bank go a little further than that in that they object to the payment or assessment of any fees against funds of the Bank as such on jurisdictional grounds.

The Court: As I remember, your request is for the allowance of fees and that you do not direct your

request to any specific sum or fund on deposit.

Mr. Walker: No, your Honor. I intend to request that they be paid out of the funds of the Long Beach Association which are in court subject, of course, to any ultimate assessment against any of the parties to the action, which would come at a later time.

Mr. Chapman: That isn't the way the other allowances were made. They were generally from the funds impounded in court. We certainly think that any further allowances should be the same.

The Court: I should think so. I would think this assessment of fees should be made generally from the funds impounded in court at this time without making a determination as to whether or not they are charged against Long Beach or anyone else.

Mr. Walker: That was what I intended to say, your Honor. [8]

The Court: What you meant was that the Long Beach Association is the only one who has any money in court?

Mr. Walker: Has any money in court from which it could be paid.

Mr. Chapman: I respectfully disagree with that.

The Court: Mr. Tremaine has a \$50,000 check in court.

Mr. Angell: It is in a sealed envelope. We can't get that.

I think for the purposes of the record we should make it clear what funds are in court, and I was going to ask before the proceeding is over that

perhaps we read into the record just what the status of that fund is.

I assume from a legal standpoint the bonds of \$5,300,000 and the \$1,000,000 in cash securing the notes of Long Beach to the San Francisco Bank are the property of Long Beach, subject only to the pledge for the notes if it ultimately is determined that those notes are payable.

The other funds that were deposited in there on the interpleaders, I assume are your funds. I don't know anything about it because I wasn't present at any of those proceedings.

The Court: I do not think so, counsel. I think that up to now there have been several hearings where the matter was in issue as to where the money was coming from, and I do not propose, prior to an adjudication of the main issues, to [9] make a determination that so much of so much money belongs to so-and-so, because that is what you are fighting over, one of the things. Whether or not the \$6,000,000 in bonds came from the Long Beach Association, you claim that they are the property of San Francisco in lieu of the note if the note is not paid, is that not right? That is, as security for the note?

Mr. Angell: Pledged for the security of the note.

The Court: Yes.

Mr. Angell: However, I assume we are not arguing this now, and we will want to state our position with respect to that before we are finished. I was just stating that I think we ought to show what funds are in there for the convenience of the court.

The court can take judicial notice of what is in there. I think it would be helpful to have it in the record just what those are so when counsel want to refer to them they will have them available.

Mr. Chapman: That I don't agree with, Mr. Angell, but I am not taking the time now to state our position or go into the main argument. If your Honor wants to hear the matter fully at this time, I would like to do so.

The Court: You have made an audit of the funds in court?

Mr. Angell: I have made no audit. There have been certain funds deposited with the clerk under orders of the court and there have been certain withdrawals from those funds.

The Court: Yes. [10]

Mr. Angell: And I am not familiar with all of the orders of withdrawal. There are a great many, as I understand it, long before I was even in the case. But I think it would be of advantage to all counsel—it certainly would to me—to know just what the condition of that fund is, since that is what we are talking about.

Mr. Whyte: Perhaps I can state it, Mr. Angell. I made a request upon the custodian of those funds the other day to determine just what was in the registry. I was informed that something over a million dollars in cash was on deposit, that is, approximately \$1,200,000—I believe somewhere in that neighborhood—then the \$5,300,000 worth of bonds which are securing the notes of Long Beach to San Francisco, plus the \$50,000 check deposited by Mr.

Tremaine on behalf of his client, together with an allowance of interest accrued on the bonds, which the custodian is unable to advise me as to the amount.

Now the Los Angeles Bank, as your Honor has pointed out, has a claim upon those funds to the extent that the note of Long Beach is not paid. That claim has already been raised in this proceeding. Therefore I concur in your Honor's suggestion that no allocation be made at the present time as to out of whose funds Mr. Walker's fees are to be paid.

The Court: In connection with the source of the funds, during the time of the argument on the motion for an injunction [11] pendente lite to restrain the Board from conducting the hearing, I had the clerk prepare an audit of the funds. I was under the impression that I had filed it or that it had been finally incorporated in the order, but perhaps not.

In other words, wherever the funds come from would be reflected by the clerk's books, and wherever they have gone to will be reflected by the clerk's books and the orders of court.

Mr. Angell: That is right.

The Court: I do not see how that could affect the allowance of a fee to the master, particularly where nothing can be gained at this time by assessing it as a fee out of money which belongs to Long Beach or to San Francisco or to the Los Angeles Bank or to Wallis.

Mr. Chapman: There are other matters besides those, your Honor.

The Court: Presently, the purposes of the mastership are for the benefit of all parties to this proceeding, whether or not by the ultimate outcome of the litigation will remain to be seen. So it does not make any difference who is ultimately going to owe or pay the master's fees. It seems to me that he is entitled to be paid, unless there is some objection to the value of his services or some of the things that he has done as unnecessary. Have you raised anything to that extent? [12]

Mr. Angell: We have, your Honor, so far as the San Francisco Bank is concerned—very definitely.

The Court: You mean that he has gone beyond his order of reference?

Mr. Angell: As far as the San Francisco Bank is concerned. We are making no objection to the payment out of any other funds than the San Francisco Bank.

Does your Honor care to hear from me, or do you want to withhold this discussion? I would like to state my position clearly for the court. We have stated our position in our objections. We are willing to stand on those objections and submit it without argument.

Mr. Chapman: I would still like to read them before the hearing is over.

Mr. Angell: Our view of the law as to allowance of master's fees does not coincide with the statement that your Honor just made, and it is our position very definitely that unless there be a general fund out of which master's fees can be paid that none can be allowed as to which any fund there is

a prior lien on, and there was a lien on when it was deposited in court. I think the cases are clear on that.

We also do not agree that services rendered by the master were rendered for San Francisco Bank, but in every instance were rendered over the opposition of the San Francisco Bank, and I think accordingly the cases are—— [13]

The Court: There was no opposition of the San Francisco Bank to the appointment of a master.

Mr. Bishop: We weren't in it then.

Mr. Angell: If your Honor please, I was not in the case at that time, but my understanding of the record is that the master was originally appointed to supervise the turn-back.

The Court: You were in the case when his powers were enlarged.

Mr. Angell: From time to time thereafter there were specific references to the master.

The Court: That is right.

Mr. Angell: In each of those cases, as I recall it without referring to my notes here, you had your first reference with respect to the accounting——

The Court: The turn-back.

Mr. Angell: ——after the turn-back the first reference was then on the accounting.

The Court: The first reference was on the turn-back.

Mr. Angell: That is right.

The Court: And the accounting.

Mr. Angell: Then the second one was as to the accounting.

The Court: Well, the accounting was in the turn-back.

Mr. Angell: Now as far as San Francisco Bank is concerned, we are not involved in the accounting between Long [14] Beach and——

The Court: Then on the motion for discovery, I enlarged his powers and appointed him. There was no opposition at that time to the appointment.

Mr. Angell: Well, there was objections, and very strenuous objections, to the discovery.

The Court: There were objections to the discovery, but not to the appointment of a special master.

Mr. Angell: Mr. Bishop states to me that there were objections to the reference on that. I am not in a position to state.

The Court: Perhaps my memory is in error.

Mr. Angell: However, I would say, irrespective of whether we objected specifically, that if a matter be referred to a master where there was no jurisdiction in the court to allow such discovery, that would not make the Bank liable for any services rendered by a special master.

The Court: Then basically your objection goes to the jurisdiction of the court.

Mr. Angell: And also that there is no benefits accruing to the San Francisco Bank for which special master's fees could be allowed. I have no question, your Honor, but that under the authorities if ultimately——

The Court: Of course we could just subpoena

all the books and records and I could sit here from now on. [15]

Mr. Angell: Of course, your Honor, if your Honor is authorizing the inspection, your orders authorizing the inspection is correct, then we would not be a party to requesting your Honor to do such a thing. We have no objection to it being handled through a master and we wouldn't have any right to an objection if the order in the first instance was correct and within the jurisdiction of the court. So it is not that we wish to burden your Honor with any further detail than necessary, but only questioning who must pay the bill. I think the cases are pretty clear that he who requests that the particular hearing or collateral matter in the main suit, or even in the main suit itself, must pay the bill until the final determination of the case at which time it can be assessed as part of the cost.

We further take the position that even though the San Francisco Bank might be liable for special master's fees in the inspection, that it could not be allowed out of the funds in the registry of the court because there is a specific fund covering a lien and they are not a general fund out of which fees for masters or attorneys or anyone could be allowed until the final adjudication of the rights of the parties in those funds. Those funds are claimed under the interpleaders that put them in there, that they belong to the Los Angeles Bank. They are also claimed that they belong to Long Beach. But the notes were issued without any security. [16]

So unless and until there is an adjudication on

those main issues, it is our position that that stands there as a trust fund, it has a lien to cover the rights of the parties of those notes.

The Court: In view of the fact that the service was so late in connection with these matters, you are the only one who is not talking in the dark concerning your objections.

Mr. Angell: I am very sorry, your Honor.

The Court: It is in response to my general questions and perfectly all right, but I think that all counsel are entitled to examine this document. Now I have some other matters on the calendar—I do not know how long they will take; there is a default matter and a petition for a writ of habeas corpus.

Mr. Chapman: We could recess to the library and read some of these authorities that are mentioned. I haven't had the advantage of even getting that part of his objections yet. And if your clerk will come down when your calendar is clear, there is a possibility that we will be through.

Mr. Angell: I am very sorry. I always attempt to accommodate counsel, but I was not served with the master's report until we were here last week—that was the middle of the week—and the time to file was gotten at my request and I apologize.

The Court: Maybe we had better put it over until next [17] Monday.

Mr. Westover: Your Honor please, I think in view of Mr. Angell's position, which I do not agree with at all and would like to be heard in response to as to the ultimate outcome——

The Court: Everybody will get a chance to be heard.

Mr. Westover: ——I would like to have an opportunity to at least read the objections to see what they are.

The Court: I will just defer it on the calendar this morning until later in the morning and if counsel are ready to proceed I will then proceed.

However, I will be in the position then where I will not have had an opportunity to read the objections.

Mr. Walker: I may say, your Honor, that my presentation will not take over 8 minutes. How much time counsel are going to use up in arguing, I don't know, but the matter should be disposed of, I should think, in an hour at the top.

Mr. Chapman: With 27 pages of written matter I certainly ought to get out half an hour's argument.

The Court: I cannot hear you this afternoon because I have a matter set especially to retry a phase of a patent case, and I cannot take it tomorrow, although I had anticipated I would have tomorrow free, for the reason that I am trying a jury case which Judge Harrison cannot try. And the next day I have a three-judge case which will run the balance of the week. [18]

Mr. Chapman: Next Monday is bad for me, your Honor.

The Court: Let us just defer it a little while, while I dispose of these other matters, and you people can recess to the library.

Mr. Chapman: And the clerk will come down and get us?

The Court: We will send Mr. Brand.

Mr. Walker: You can even call on the services of the special master.

Mr. Angell: If I might impose upon the court's time for just a moment, I want to mention this: When we were here on the hearing of the application of Messrs. O'Melveny & Myers and FitzPatrick and Mr. Gilbert on attorneys' fees, it was put over until March 21st.

The Court: Yes.

Mr. Angell: At that time I did not have my calendar of my office here, but my recollection was that it was clear. Upon returning to my office I find that I have a stockholders' anual meeting set for the 21st at 2:00 o'clock, and it is impossible to put that hearing over. That is an annual meeting.

I have already spoken to such counsel as I have seen, or have had an opportunity to speak to, and I was going to call each one and then speak to the court. I was going to ask if we could have that go over until March 22nd instead of the 21st. I have prepared most of the work in that and neither one of my associates have prepared it as much as I have, and [19] I was being looked to to present the matter.

Mr. Westover: If your Honor please, I think Mr. Gilbert reported that the other trial that I had set on the 21st in Judge Mathes' court, Judge Mathes very kindly did put that over to the 9th, at Mr. Gilbert's and my request.

The Court: The 9th of April?

Mr. Westover: No, it went clear over to the 9th of May because he was going to be away, but we did that in deference to the court.

The Court: I think we can start this on the 22nd.

Mr. Angell: I would undertake the sending of a letter to each one of the attorneys notifying them, your Honor, if counsel would grant me that courtesy.

The Court: Probably you should give them a formal notice of continuance of hearing.

Mr. Angell: I will be pleased to do so.

The Court: So the record will show the notice and the return of service on it.

Mr. Angell: Thank you. And I also thank counsel.

The Court: That will be the order. The order heretofore made setting all matters in connection with applications for fees of Gilbert or O'Melveny & Myers and related matters on the 21st of March, 1950, at 10:00 o'clock, is vacated and the matter is continued to and set for March 22, 1950, at 10:00 o'clock. [20]

Very well. If you gentlemen want to leave, I will go ahead with the rest of the calendar.

Can somebody give me an estimate as to when the inspection will be concluded or the accounting, or the master's report on the accounting finished?

Mr. Walker: Your Honor, I would anticipate that these discovery proceedings will last at least two months or more, probably three.

The Court: And the accounting went over?

Mr. Walker: The accounting went over until

May 22nd, I believe, for a supplemental accounting. At that time, time will have to be given for further objections. The accounting proceeding may well last until the end of the year.

The Court: This year?

Mr. Walker: Let us just leave it at "the" year. With no interruptions we should finish it by the end of 1950, but I do anticipate interruptions.

The Court: I will continue Items 1, 2, 3 and 4 until July 24, 1950. Maybe by that time we can get some definite date.

Mr. Walker: Thank you.

(Whereupon, at 10:40 o'clock a.m., a recess was taken in the above-entitled matter.) [21]

March 6, 1950, 12:00 o'Clock Noon

The Court: Mr. Walker, where are counsel?

Mr. Walker: They will be here in about two minutes, your Honor.

The Court: Have the parties had an opportunity to examine the files and are ready to proceed?

Mr. Westover: We had a chance to read the petition but not to read all the cases cited because many of them are state cases which are not contained in the Federal Court's library here.

The Court: Are you ready to proceed?

Mr. Chapman: I am ready to proceed, your Honor, with certain matters in behalf of the Long Beach Association if your Honor can make an order that the matters are deemed denied. There are many factual allegations in the supporting affidavits which we think are completely contrary to our view of the facts.

Now we have set our view of the facts forth on many occasions in verified pleadings. If your Honor can make an order that the Association's previous pleadings in this action can be taken as a denial of the 23- or 24- or 27-page objections of the San Francisco Bank material without need of our making counter-affidavits, I think we can proceed on that basis. [22]

Mr. Tremaine: I think that could be done by stipulation to expedite matters.

Mr. Angell: As far as I am concerned, Mr. Tremaine, there is no objection at all. I assumed that you would deny it.

The Court: In other words, the stipulation is that except for the official defendants, all matters of fact alleged in the document filed this morning by the Federal Home Loan Bank of San Francisco, and denominated an Answer to Interim Report, etc., are deemed to be denied by all other parties.

Mr. Angell: Might I make the suggestion, your Honor—we had such a stipulation before and I think it more accurately covers it—there might be some allegations of fact in there that they wouldn't want to deny, that we stipulate that by failure to file a denial that there would be no admissions deemed to result therefrom, if that will suit your purposes. The other is all right with me, but you do not admit the truth of any of the allegations of fact in our objections and answer.

The Court: Then the stipulation is that all parties to the action, including the official defendants and including the special master, will not be

deemed to have admitted any allegations of fact contained in the answer, or the document denominated an Answer to the Interim Report filed this morning by virtue of their failure to have denied it. Is that [22] stipulated to?

Mr. Chapman: Including the affidavits?

Mr. Westover: Including the affidavit of Mr. Noon attached?

Mr. Angell: So stipulated for the San Francisco Bank.

The Court: The answer and everything that is a part of it. Is that so stipulated by everybody?

Mr. Whyte: So stipulated for Los Angeles Bank.

Mr. Tremaine: So stipulated.

Mr. Fitting: So stipulated.

Mr. Walker: So stipulated.

The Court: Is anybody authorized to stipulate for Mr. Sutter?

Mr. Chapman: I think at this time, your Honor, I should present the apologies of Mr. Gilbert. He had to be in Ventura and he asked me to state to the court that it was a new trial, the time of which was expiring. I do not know his attitude, but I think we should let the stipulation be for him also, subject to his right to reject it if he wants to when he hears of it.

The Court: Very well. That will include Mr. Gilbert and Mr. Sutter.

Mr. Angell: The San Francisco Bank will stipulate that it may include all parties to the action.

The Court: Other than the San Francisco Bank? [23]

The Court: Very well. That stipulation will be approved. That is not only all parties, but also the special master?

Mr. Angell: Including the special master.

Mr. Walker: Mr. Angell asked me coming into court who my attorney was, and I wanted to take him seriously. I think it was half in fun and it was half seriously. Perhaps in a presentation such as this it can be handled much more effectively by someone who is not so vitally interested. I am somewhat in the position of the defendant who was sitting over here in the habeas corpus matter this morning.

To recall briefly to the court some of the preceding matters here, you will recall that a year ago in March an application was made for fees.

The Court: March, 1948, was it not?

Mr. Walker: March, 1949, is the one I am referring to, a year ago when settlement was talked, and at that time I was asked to give a figure which would indicate the total fees in the event of an imminent settlement. At that time I placed a figure, or threw into the air a figure, of \$50,000. At that time \$10,000 was granted.

The Court: How much previously?

Mr. Walker: There had been a previous grant of \$20,000.

Then in November, at the conclusion of the extended hearings which ran well into the morning, the allowance was [24] made about 4:00 o'clock in the morning of \$5000. So there has been paid to date a total of \$35,000.

Subsequent to the hearing in March of 1949, at the request of several of the parties to the action, I went to Washington to participate in conferences there over the settlement. This trip consumed about a week, spent in traveling and in Washington.

The Court: As I recall, I did not make any special order, but you asked me before you went whether or not I thought it was consistent with your duties as special master, and I advised you that you should go in connection with your duties as special master, not only with relation to the hearing on the accounting, but with relation to the inspection and with relation to the possible terms of settlement then being discussed, which comprehended the possibility of a turn-back under the supervision of a special master.

Mr. Walker: That is correct, your Honor.

The Court: I have examined the objections and, except for (c) on pages 8 and 9, and (h) on page 12, it seems to me that all of the other items go to the question as to whether or not this court can or cannot assess a fee at this time against the San Francisco Bank.

Do I correctly analyze it?

Mr. Angell: That was (h) on page 12?

The Court: Yes, (c) and (h) say, in effect, that the [25] special master's report is not itemized.

Mr. Angell: Would it be helpful to the court if I state what our position is with respect to those items?

The Court: Let me ask counsel for the opposition if their view is the same as mine: Except for

those two objections, all the other objections appear to me to go to the legal objection that this court cannot assess these costs against the funds, nor any fund of the San Francisco Bank.

Mr. Chapman: No.

The Court: You do not so analyze it?

Mr. Chapman: No, your Honor. Of course I have only had a brief opportunity to read some of the authorities.

The Court: Very well. The answer is no.

Go ahead, Mr. Walker.

Mr. Walker: Subsequent to my return from Washington, my time was largely occupied here in numerous conferences with various of the parties, again concerning the settlement and various hearings and conferences in chambers and in court concerning the modifications made in the fee allowances as then affecting the settlement, and in settlement of the various orders pertaining thereto.

During the summer of 1949 there were several court hearings involving the taking of a deposition of Mr. Fahey, in which I participated and attended, as I have done at each of the court hearings in this matter, because each of the hearings, [26] in my opinion, touched upon one or more phases of matters which have been referred to me. These included the prolonged hearings over the granting of the injunction and several evening sessions lasting, in one case, until 1:30, as I recall, and others quite late, involving the settlement of the injunction order.

The matters of the discovery proceedings were continued from time to time throughout the entire year 1949. Commencing on January 19, 1950, such discovery proceedings were recommenced in the office of the San Francisco Bank at Los Angeles. A preliminary discovery proceeding, which involved an inquiry into the nature, type and character of the files maintained in each of the three offices of the San Francisco Bank, including the preparation of the master's report, occupied approximately 21 full days, and required travel to San Francisco and Portland.

The Court: That is subsequently?

Mr. Walker: That is on the discovery proceedings alone.

The Court: That is up to what date, December, 1948?

Mr. Walker: No, it was in the trip to San Francisco and Portland which was in the middle of November, 1948.

Mr. Bishop: It started I think right after election day.

Mr. Walker: But you will recall in each of the previous applications for fee allowances there was expressly excluded [27] any demand covering the discovery proceedings.

The Court: Yes, I remember that.

Mr. Walker: Then during January and February of this year, about 20 days have been spent by the master on the discovery hearings and in preliminary work in connection therewith.

Now it might be thought that the discovery pro-

ceedings would be an entirely innocuous affair. Such has not proven to be the case. Your Honor emphasized the word "how" earlier this morning when he said "how" the discovery proceedings were proceeding. If I was asked on the progress of the discovery proceedings, we are getting along, but there is a long way to go. As to how they are proceeding, they are proceeding with all flurry and fanfare of a three-ring circus, and I am reminded more of a murder trial in a state court than the usual somewhat innocuous discovery proceedings.

While much of the time has been spent in the actual inspection and examination of documents, there have been a great many rather acrimonious arguments requiring rulings and decisions of the master. That is probably due to the fact that this case has endured over a matter of some four years, and counsel have become so deeply involved in it that their attitude is perhaps more that of litigants than of counsel sometimes, because tempers run high. However, everyone has been most cooperative. I do not mean to criticize counsel [28] at all, except that the proceedings are not without their difficulties.

Now as to the elements which must be considered in arriving at a figure for a fee, I can add no superlatives to the statements made by counsel and by the various expert witnesses who have testified in support of fee applications, as to the complexities of this litigation. I believe it was Mr. Morrow who said he had never seen a case with the complexities of this litigation. I think it would be impossible

for anyone to act intelligently on any phase of this matter as master, had he not been familiar with the case in all of its multiple ramifications since its inception.

The Court: Let me say that I thoroughly agree with that, that any special master would be lost stepping into either the discovery proceedings or the accounting proceedings if he were not thoroughly aware of all the current things that are happening in the case.

Mr. Walker: Thank you.

The amounts of money involved, damages claimed and property, such as bonds and certificates, which have passed in this matter, are tremendous. The amounts stagger one's imagination. The amount of money involved is always present in a lawyer's mind in fixing fees to be charged to a client, regardless of the time required by the litigation. I don't suppose this rule applies as much to the value of the services [29] of a special master as in the case of an attorney, yet it cannot help but have some bearing. I say this because, in my opinion, this is one case where maximum fees are justified on almost every element that is usually taken into consideration in determining the amount of fees. Certainly it is so far as the attorneys involved are concerned.

The case is one of national importance. It is one of importance to every savings and loan association in the western district, besides the parties who are actively participating in the litigation. And I have in mind very firmly that any fees allowed to the

special master would be trifling compared with the total costs actually expended by them.

Also the time spent is of paramount importance. While the entire time of the special master has not been fully occupied by this case, the demands made upon him have been such as to interfere greatly with other legal work and in fact have prevented him in three or four cases from accepting retainers in substantial cases which would have required considerable time on his part.

From the standpoint of time I have been acting for two years and I think seven weeks, or close to 26 months. During the first year practically full time was required. There were about six months of time spent in Long Beach during the active turn-over of the assets and in conducting the election and the balance in connection with the long and extended [30] conferences which went on for months concerning the proposed settlement and in study and preparation of material proposed to be used in connection with the settlement.

During the calendar year 1949, it is a little difficult to estimate, and I kept no accurate time check on each hour, but I would say that approximately——

The Court: Hereafter I think that you are going to be under the necessity of keeping account of your time.

Mr. Walker: I have started such a procedure.

The Court: To have a time check?

Mr. Walker: Yes.

The Court: Of course I may say this, that dur-

ing the year 1949, toward the latter part I think that probably everybody let down a little bit in connection with it because it appeared imminent that the whole matter would be settled and disposed of without controversy.

Mr. Walker: That is true, your Honor. At any rate, from a rough estimate, I would estimate three-fourths of my time during the year 1949 was used in connection with one phase or another of this case.

During the year 1950, which is almost a quarter expired, it is fair to say that full time has been spent in connection with the accounting and discovery proceedings.

Balancing that up, it amounts to approximately two years full time work. [31]

The testimony of Mr. Morrow, Mr. Belcher and the other witnesses concerning the appropriate charges to be made by an attorney was very interesting, and I believe it affords a basis for the court to grant an allowance on master's fees based on the value of time.

A yearly income of \$50,000 was used in one case, and that was cross-checked by an hourly charge of \$50 an hour. Another estimate of value was given of \$10 an hour as the basis of charging time for a junior clerk of a law office. I hope that the time of the special master is worth more than that of a junior clerk. If not, I have wasted about 20 years that have elapsed since I held such a position.

Taking a figure less than the yearly income of \$50,000 suggested by Mr. Morrow, and using a

figure of \$35,000, it would be a total of \$70,000 presently accrued.

Approaching it from another standpoint, two full working years computed on a basis of \$150 a day and a working year of 260 days would total \$78,000.

For hearings such as the accounting and discovery proceedings to date, it would seem to me that a figure of \$150 a day would be an absolute minimum, but a figure of \$250 a day would be more appropriate and more in keeping with the fees charged by the attorneys in the presentation of almost any case in Federal Court in this district.

I am therefore suggesting that a total fee which may [32] have accrued during the interim period would amount to an absolute minimum of \$70,000. I believe in view of the importance of the case, the amounts involved, that it might well be considerably more, but using this as a base figure, and an amount of \$35,000 having been paid, there would be \$35,000 unpaid. I would therefore suggest a figure for a partial interim allowance at this time in the sum of not less than \$25,000.

I was greatly impressed by a statement that I believe Mr. Belcher made on the witness stand the other day, and that is that a competent lawyer who charges less substantially is not doing justice to himself. When a lawyer dies he doesn't leave a grocery store, to quote Mr. Morrow, he just dies. He has to accumulate that "grocery store" in other forms.

I need not add that this job was not one of my

seeking, and that apparently up to this time it has been performed to the satisfaction of all parties. The only opposition expressed here has been the reiteration of the jurisdictional grounds hereinbefore urged in the action in chief.

The record now contains ample testimony as to the value of an attorney's time. The duties of a special master are no less onerous than those of an attorney. At least an attorney has the advantage of being able to go all out on one side and does not have to be straining himself as one in a quasi-judicial office does. [33]

Again, as I say, this is a case where all of the elements supporting large fees are present, and if an attorney in litigation of this type cannot receive substantial compensation he might as well give up the practice of law because there will be no other case where he could.

I am not unaware that the moneys and properties involved in this litigation are, in the last analysis, public money. I have discussed that before. Nor am I unaware that the cost of the litigation has already been tremendous and if it continues, as apparently it will, they are going to be colossal. Nevertheless, as I have already stated, any fees which might be allowed to the master would be minuscule as compared with the attorneys' fees and all of the direct and indirect cost of the litigation.

I sincerely feel that the sum I have suggested as a minimum partial interim allowance at this time is entirely fair and reasonable, and that a grant of a lesser sum would not be compatible with the

prestige and dignity of the office, nor of this court.

In that connection, I would like to read to the court a short paragraph from the case of *Newton v. Consolidated Gas Company*, cited by Mr. Angell in his answer in opposition. That is 259 U. S. 101. Reading from page 105:

“The value of a capable master’s services cannot be determined with mathematical accuracy; [34] and estimates will vary, of course, according to the standard adopted. He occupies a position of honor, responsibility and trust; the court looks to him to execute its decrees thoroughly, accurately, impartially and in full response to the confidence extended; he should be adequately remunerated for actual work done, time employed and the responsibility assumed. His compensation should be liberal, but not exorbitant. The rights of those who ultimately pay must be carefully protected; and while salaries prescribed by law for judicial officers performing similar duties are valuable guides, a higher rate of compensation is generally necessary in order to secure ability and experience in an exacting and temporary employment which often seriously interferes with other undertakings.”

Now in that particular case we also have some figures which are interesting. I might say that the case was decided in 1922. The first allowance was for a period of one year——

The Court: You mean a dollar was a dollar then?

Mr. Walker: A dollar was a dollar then.

This was based on one year’s work on a 5-hour day. The original allowance was \$118,000, which

the court cut as exorbitant, and the amount was reduced to \$49,250. [35]

The Court: Who wishes to be heard next, and how long does everybody wish to be heard?

Mr. Angell: I can go next, your Honor, being an objector.

The Court: How long will you be?

Mr. Angell: I should be very short, your Honor. We stand on our objections and answer as filed.

I would like to address myself to state our position with respect to these funds. I think it will be very short, your Honor.

Mr. Walker: May I have just another moment, your Honor?

The Court: Yes.

Mr. Walker: There has been some discussion over the funds in court and I can give your Honor accurate figures on them if you are presently interested. It probably will come up for discussion by the other parties. I just got these figures from the clerk.

There is presently on deposit in cash in the registry of the court \$1,404,216.41.

In addition to that and as security for the \$6,300,000 note, there is \$5,300,000 worth of Government bonds.

The Court: With unclipped coupons?

Mr. Walker: With unclipped coupons. I will get to the interest in a moment, your Honor.

If we take the total of the cash and the bonds, that is, [36] if you total the \$5,300,000 in bonds to the cash you have a total of \$6,704,216.41.

The Court: And the note is what?

Mr. Walker: \$6,300,000. There is an over plus of \$404,216.41 over and above the amount required as collateral for the note.

The Court: Not taking into consideration either the interest on the note or the interest on the bonds?

Mr. Walker: They almost exactly offset each other, your Honor. That is shown in the affidavit of Mr. Noon which is attached to the answer of the San Francisco Bank. I believe there is about \$8000 more interest has accrued on the bonds than has accrued on the note.

Mr. Bishop: There is \$6,569,325.12 due by way of principal and interest as of February 28, 1950, on the notes.

The Court: And there is \$6,577,851.20 accumulated on the bonds with interest, or there is \$8000 more accumulated in interest than there is due.

Mr. Bishop: That is correct. But there was also a credit in there for \$3042.

The Court: In other words, roughly they offset one another.

Mr. Bishop: Substantially; yes, your Honor.

The Court: I see.

I wonder if we had not better put this over until 2:00 [37] o'clock. While I have another matter at that time, perhaps this will not take more than half an hour, do you think? How long will you people want to take?

Mr. Chapman: I think I will need 10 or 15 minutes, your Honor.

Mr. Westover: I would like to have 5 or 10 minutes.

Mr. Tremaine: 5 or 10 minutes is agreeable with me.

Mr. Bishop: Could I have one minute, if the court please?

While we are speaking of Mr. Noon's affidavit, I would like the record to show that that is the affidavit that the court requested us to file and have on file in connection with the application for attorneys' fees and expenses of O'Melveny's office, that we were to have on file I think by the 15th. That same affidavit will serve for this hearing as well as the application of O'Melveny's office for fees and expenses.

I thought that I should call that to the court's attention.

And I would be glad to give your office further copies, so I will mail them to you, Mr. Whyte.

Mr. Whyte: Thank you.

The Court: We will put it over until 2:00 o'clock and proceed at that time.

Mr. Whyte: Your Honor, may I make a short statement [38] before we adjourn? I have some other matters this afternoon and I might just state the position of the Los Angeles Bank so it won't be necessary for us to appear.

The Court: Very well.

Mr. White: We have no objection whatever to your Honor allowing whatever you deem to be a reasonable fee to Mr. Walker as special master of this court. Our position is that as to the cash on deposit, it is clearly in excess of the \$1,000,000 already earmarked as security for the notes, which

is the only amount that the Los Angeles Bank has a claim to, or has asserted a claim to, and it being in excess of \$404,000, we think it is perfectly proper for your Honor to allow reasonable fees to Mr. Walker in such amounts as you desire at this time as money to be paid out of those funds without injury to the Los Angeles Bank's position at all.

The Court: Unless I am convinced, I do not propose to assess them against any particular person's right to the fund. They will be assessed against the funds.

Mr. Whyte: That was my understanding. I just merely stated that there is enough to pay.

The Court: How much do you think the special master ought to get?

Mr. Whyte: I am not going to decide that question, your Honor.

Mr. Angell: May I make one statement for the record [39] only, and it is in correction of what Mr. Whyte said regarding what the San Francisco Bank claimed.

Mr. Whyte: Excuse me, Mr. Angell. I only stated what the Los Angeles Bank claimed.

Mr. Angell: I thought you said the San Francisco Bank.

Mr. Whyte: Not at all.

The Court: Very well. 2:00 o'clock.

(Whereupon, at 12:35 o'clock p.m., a recess was taken until 2:00 o'clock p.m. of the same date.) [40]

March 6, 1950; 2:30 P. M.

The Court: Very well. Mr. Angell?

Mr. Bishop: Your Honor, I was just going to address the court. Mr. Angell was called to a long distance telephone call and I thought we could proceed to clear up this calendar in one respect.

There was discussion this morning about the necessity of serving notice on all parties under the legal rule in this case. I thought some time ago that it had been understood that this rule did not apply because if we had to serve notices——

The Court: Only on the appearing parties.

Mr. Bishop: Well, there are those who appear as counsel for interpleaders, innumerable counsel, and if we are going to have to serve all of them, the rule has to be broken some place.

The Court: I thought it was pretty well cleared up at that time. It was only on the appearing parties in the main litigation. Certainly not on all the appearing counsel in connection with all of those petitions for intervention.

Mr. Bishop: The other thing, I thought, in view of the court's indulgence in granting us a continuance to March 22nd, I thought possibly the calendar should be called that day because notices were published to the world in so far as [41] that application of O'Melveny & Myers for fees and shareholder expenses were concerned, because there are many counsel whom we don't know about who will appear.

The Court: You mean there has been a publication of the notice for a continuance?

Mr. Bishop: No. That is why I say the whole matter should be announced or called on the calendar on the 21st and then announced orally that it is continued to the 22nd.

The Court: That is agreeable to me. If you folks will remind Mr. Stacey, my clerk, about it I am sure we will call it.

Mr. Angell: Your Honor please, I understand that there is another case waiting to go on. I will try to keep my remarks as brief as possible.

Your Honor please, I wish to say, so far as the San Francisco Bank is concerned, we are not taking the position that the special master is not entitled to compensation unless the jurisdictional objections asserted in the answer and objections were good. **However**, we stand on the objections and answer as filed.

There are only two points that I wish to address myself to here this afternoon with respect to this application. The first of those is that there can be no payment at all out of the fund because there is no such fund in existence from which such a payment could be made. [42]

The Court: Just a moment. I have to follow you. You say there can be no payment from the fund because there is no such fund? What do you mean?

Mr. Angell: Out of the general fund, because there is no such general fund that exists.

I base that upon this, your Honor: The moneys in that impound, as near as I can recall it, are, first, those impounded from the San Francisco Bank,

some \$6,300,000, which, at the time they went into the impound were security for the notes which were likewise impounded at that time, the notes of the Long Beach Savings & Loan Association payable to San Francisco Bank. They were security collateral.

The second fund, as I recall, is the Turner interpleader, which interplead moneys into the fund, which claims are rival claimants to it. That is the second fund.

The third fund is the moneys that, as far as I know, no one claims except Long Beach, which were the results of withdrawal of collateral or payment of notes and deposited here in the registry of the court pursuant to court order. As far as I know, as I say, even in these pleadings I know of no claim made to that fund other than by the Long Beach Association.

The only other moneys in there as such are the moneys for the insurance policies, which were likewise a specific fund and deposited for specific purposes. [43]

Now there is also the Wallis check but, as I understand it, that is in the form of a check and that is not subject to being turned into cash until a determination of rights in it is made, if there are any claims as to that.

My position on that, your Honor, is this, that there is no question but what a court in a proper case may appoint a special master and that he may be paid. The only question is out of what funds he may be paid. If it is in a case where

the general funds of the entire matter in litigation are before the court, such as in reorganizations and receiverships, the whole assets of the corporation are before the court, and assuming that the prior obligations, secured obligations, do not eat up the entire fund then there is a general fund from which master's fees or attorney's fees or anyone else's fees may be paid.

But assuming that that is not the case——

The Court: They may even be paid from secured funds.

Mr. Angell: With qualifications, yes, but not the qualifications as exist in this case.

If there are rival claimants to a secured fund and some one of those rival claimants asks for a determination of the rights, the claimants to that fund, and the court appoints a special master for hearings to take the testimony and make its findings in connection with that application, and then those funds would be subject to being tapped for the [44] master's fees.

But there again you have only a single fund claimed by rival groups standing in exactly the same secured position. And that fund then would be liable.

Now in this case we have no such fund. The San Francisco Bank, under the law, must have that security to make loans and it is there for those promissory notes. It must stand there for those promissory notes. That is irrespective of the services rendered.

The second point I am going to make is that a master's fees cannot be allowed under these cir-

cumstances unless he renders services for the party out of whose funds payments are made.

Now that is the San Francisco fund. It is a very specific fund and was charged with a lien at the time it came in to the registry of the court.

Now the next fund——

The Court: Let me see, before you go on further. Let me see if I can review the funds.

The first fund or money that came into this court in connection with this litigation was the money of Wallis.

Mr. Angell: Yes.

The Court: The next was the money of miscellaneous trust deed obligors, some 400-odd parcels of property.

The next was the money under order of the court from the [45] San Francisco Bank to deposit in the note plus the bonds, which we will call Fund 3 together.

The next was the Turner interpleader, and the next and last was the Federal Deposit Insurance Corporation premiums.

Those are the five sources of funds that are now on deposit. Is there any question about that?

Mr. Angell: I believe that exhausts them, your Honor.

The Court: Is there any question about that?

Mr. Angell: I think that is the order in which they came in.

The Court: I think that is the order in which they came in.

Now we do not know who Wallis' money belongs to yet, do we, that \$50,000 check?

Mr. Angell: As far as I say, I do not recall any pleadings in the case where anybody claims it except Wallis.

The Court: It is part of the litigation. The Long Beach claims it.

Mr. Angell: It is voluntarily there.

The Court: As far as the trust deed depositors are concerned, they have washed out and they say that that either belongs to the Long Beach Association or it belonged to Ammann as conservator.

Mr. Angell: They can say it, but the facts are, Mr. Ammann is no longer conservator, or as long as he is not acting [46] as such, if he is.

The Court: That is right. As far as that is concerned, they are the people who produced the money. They say, "We do not know who the money belongs to; we either owe it to Ammann or to Long Beach."

And the money, as far as the San Francisco Bank is concerned, the note and the bonds, that resulted in a deposit in court from the order to restore the association and the ensuing proceedings.

As far as the Turner money is concerned, he again was like Wallis, he said, "I do not know who to pay the money to, so I will put it in court."

And as far as the Federal Deposit Insurance Corporation is concerned, the Association has come in and said, "We do not know how much money we owe to the Federal Deposit Insurance Corporation or who we owe it to."

So on the basis of who the money belongs to, I do not see, Mr. Angell, how at this stage of the proceedings I would be justified in making any conclusion. I can find, if the parties desire, where the money came from.

Mr. Angell: I don't think that is quite my point, your Honor. My point is that in this particular case and under the circumstances and facts of this case, there is not in court any general fund from which any master's fees can be allowed until a final determination of the case, that the [47] only fees that could be allowed would have to be awarded against those persons for whom the services were rendered; that these funds, until they are finally adjudicated, each and every one of these separate funds, are not like the general assets of a corporation where there is a residue or equity, but these are all rival claimants, all with different claims and not the same parties claiming in there at all.

The Court: That is right. Let me give you an illustration—I do not know whether this will serve the point or not—but I have another case pending where there were proceeds from an oil well. One group of claimants claimed that they were entitled to all of it and another group of claimants claimed that they were entitled to all of it. In the course of the litigation I required all of the money to be deposited in court, because each one said, well, if the other one has it we maybe will not be there when we get ready to get it. So in order to determine some of the conflicting things I appointed a master and charged it against the whole fund.

Mr. Angell: That is the first case I cited, your Honor, where you have a common fund to which rival claimants seek that very fund.

The Court: But you have here several common funds. You have the Wallis fund, you have the trust deed fund, the San Francisco Bank fund, complained about with the Los Angeles [48] Bank, the bonds, the Federal Deposit & Insurance Corporation, and the Turner fund.

Now as far as the Wallis fund is concerned, that may be set apart. As far as the trust deed fund that is to say, the moneys coming in from the trust deeds, as far as the San Francisco Bank note and the bonds to secure it and the Federal Deposit & Insurance Corporation, the claimants there are about the same, are they not?

Mr. Angell: I would say not. San Francisco Bank claims their funds on this governmental bond for \$5,300,000 and \$1,000,000 exclusively, as far as I know, against the Long Beach Association.

The Court: Yes, but Los Angeles Bank also claims that same fund.

Mr. Angell: It is pleaded that in the third-party complaint, as I recall it. That is where it was brought in. And they do allege that Los Angeles claims it. But it is equally disputed that there was no Los Angeles Bank in existence at that time, so that is one of the very things to be ascertained.

The Court: Ultimately.

Mr. Angell: So let's add another claimant to it. So we simply say that Los Angeles claims it, San Francisco claims it and Long Beach.

Now we go over to the funds deposited under these trust [49] deeds and San Francisco doesn't claim any of those, Los Angeles, as far as I know, doesn't claim it.

The Court: San Francisco does claim those funds because the million dollars or a million and a quarter, whatever it is, is the result of having paid off those trust deeds.

Mr. Angell: But that was under a very specific order of this court constituting collateral. The million dollars was put right back in funds to take the place of those trust deeds that were taken out, so that million dollars became earmarked as a collateral for the \$6,300,000 note, so that is still earmarked.

The Court: Let us look at the \$6,300,000 note a moment and its collateral and consider them as one. The San Francisco Bank claims the \$6,300,000 note, do they not?

Mr. Angell: Yes.

The Court: The Los Angeles Bank says that they do not belong to San Francisco, that they belong to the Los Angeles Bank, is that not right?

Mr. Angell: I think that is correct.

The Court: They say that.

Mr. Angell: Let's say they do.

The Court: Very well.

Mr. Bishop: Your Honor, I want to try to help the court. I don't think the Los Angeles group would claim that they own that note. They would claim they owned the securities. [50]

The Court: Either way it is \$6,300,000, and the

Long Beach Association claims that they do not owe either of them that because the liability on the \$6,300,000 note was unlawfully created.

Mr. Angell: I think that accurately states the position.

The Court: So you have three claimants to that.

Mr. Angell: That is correct.

The Court: So somebody wants discovery in order to determine what their rights are in connection with that, and the court appoints a special master.

Mr. Angell: Yes.

The Court: Can I not assess it against everybody for the time being until I can determine, or a court of competent jurisdiction can decide, to whom the money is owing?

Mr. Angell: Our position is positively and definitely no, that that is one of the things the court cannot do. It would be a preadjudication. That states it specifically as to the San Francisco Bank fund. I think it would be equally true to the Long Beach money, and it would be true as to the others, but I am not arguing their case and what position they take on it I do not care. But I do take it as to the San Francisco fund.

The Court: What I have said about the San Francisco fund I think applies the same as to the Federal Deposit & [51] Insurance Corporation and to the Turner money and to the Wallis money. I do not know. Maybe Wallis will wind up here paying all these expenses.

Mr. Angell: I think the cases are rather clear

that where there is no general fund—and when I say “general fund” I mean not one claimed specifically—other than by general creditors in so far as a special interest is claimed in the fund, that when there is no such fund in existence before the court then there is only one thing the court can do to award interim fees, and that is to award them against the party requesting the proceedings that led to the appointment of the special master. I think that that has to be the yardstick, and I think when I step to the next point that I wish to bring to the court’s attention, you will see the reason why.

The Court: While you are on that point, and on the matter I discussed a moment ago, the master has had referred to him not only discovery, but accounting. In connection with the accounting, assertions are made that the liability which is evidenced by the promissory note of \$6,300,000 was unlawfully incurred by Ammann and should be surcharged against him, or some portion thereof.

Mr. Angell: I believe you have answered it, your Honor, when you stated——

The Court: So the thing I think the Board put it right, [52] that it is inextricably interwoven.

Mr. Angell: I think you have answered the question when you stated, that is, that the Long Beach claimed that and that the minute you say the Long Beach claimant says, who is going to pay for that special master until such time as it has been adjudged that they are right, until such time as the Long Beach is right then it can be assessed as part of the cost of the suit against the Board.

The Court: Is not the San Francisco Bank claiming the right, that the \$6,300,000 is theirs?

Mr. Angell: Very vigorously, so much so that we don't want it touched, not even for the special master.

The Court: Why should you not pay it all if you are claiming it, if the basis of a claim is the basis of a settlement of costs?

Mr. Angell: It is the one asserting the claim in the first instance.

The Court: Are you not asserting it?

Mr. Angell: We are defending. Those funds, if your Honor please, were ordered into court on order of court over the vigorous opposition of the San Francisco Bank and ordered to state our claims in it, so at every stage of these proceedings, as far as I know, the San Francisco Bank has vigorously opposed the deposit of those funds into court. It was not a voluntary act. I do not think that by an order [53] of court you can take security away from a secured creditor, put it into the registry of the court, and then start charging the general expenses of the litigation, and certainly litigation as wide flung as this one, against that fund that has been brought into court. Because, if your Honor please, there are practical difficulties that lie in the way. I am not merely arguing to be capricious or to be obstinate. I think there are real rights of our clients involved.

That brings us to the second point, and that is here the master is asking for the payment of services which cover three different matters. One is the

accounting. I think it must be conceded that so far as many defendants in this action and cross-defendants and third-party defendants, including the San Francisco Bank, are concerned——

The Court: And interpleading defendants.

Mr. Angell: Interpleading defendants.

The Court: And intervening defendants.

Mr. Angell: ——have no particular interest in the outcome of that accounting.

Mr. Chapman: That is not conceded by us.

Mr. Westover: We do not concede that.

Mr. Angell: I will stipulate now, so that I will not be unnecessarily interrupted, that you will not concede anything that I state here, that this is purely my argument.

The San Francisco Bank is not concerned with that accounting. [54] It was asked for by Long Beach. I think it is wholly proper to make proper charges for the master's services against Long Beach.

The Court: No, it was ordered by the court, and I have difficulty staying with you, Mr. Angell, because you are now arguing as the San Francisco, and I repeatedly read in documents that are filed that the San Francisco Bank is really not the San Francisco Bank, that it is the Home Loan Bank Board, and that it really is not the Home Loan Bank Board, it is the United States of America. So which is it?

Mr. Angell: Those are legal concepts, your Honor, arising out of the construction of the Home Owners Loan Act and which I think would serve

no useful purpose to argue here in connection with this.

The only point is this, in the accounting, your Honor states that the accounting was ordered by the Board. Of course it was ordered by the Board. When the conservator was removed at the instance of the stockholders of Long Beach and Long Beach itself, it became necessary.

The Court: I understood the conservator was removed voluntarily by the Board. That is what the resolution recites. It does not recite any request or compulsion.

Mr. Angell: I will withdraw my statement, because that is a matter which will have to go to proof when we finally come to the proof, particularly in view of the fact that I [55] was not on the ground at that time or counsel in the case.

The only point I am making is whenever a conservator is removed who has been appointed under the acts, then there is to be an accounting and under the acts, the presentation and under the regulations under those acts the procedures for those accounting are all set up. I take it that that is the accounting that the Board referred to when they ordered an accounting, they had to, and they had a right to public hearings on those accountings, and the whole machinery is set up there.

If your Honor will recall, it is my recollection in reading back into what took place at that time when your Honor supplemented—I believe that is what it was called—supplemented the order of the Board and ordered an accounting in this case, I

believe—and I want to be corrected if I am wrong—that the Board opposed the appointment of any accounting in this action. Now I think that is an accurate statement of what occurred.

Mr. Chapman: When do you want to be corrected, Mr. Angell?

Mr. Angell: Right now, if I am incorrect on that.

Mr. Chapman: You are incorrect, but it will take some time to answer it.

The Court: Yes, it would take too long to answer it. I was there. [56]

Mr. Angell: If your Honor was there, you know.

The Court: I was there when the hearings were had and when I made the order, so let us go on.

Mr. Angell: They speak for themselves.

Now the San Francisco Bank, as far as I know, was no party to those proceedings. Now in the ordinary accounting case we would not have the expenses of a special master incurred as they are being here at a time which seems to be the case of a cart before the horse. Ordinarily whenever there is a requirement for an accounting the legal issues would be determined first, and that is, who is right. Much of the accounting, as I understand it—I might say, your Honor, I have not followed every part of the accounting proceedings, only generally.

The Court: You can be thankful for that.

Mr. Angell: I know that there are different claims as to the rights of the two parties in the accounting. One party bases their right to an accounting, at least in part, upon their position in the

main issues of the case. The other bases theirs on the outcome of the issues in that case.

So it would seem, and it would save a great deal of expense in money and accounting and everything, if those issues were decided in advance to find out who was right as to the claims being made, at which time an accounting on that basis and the outcome of the decision of those issues would determine [57] the nature of the accounting which was to be had.

The Court: Yes, that would be very much to be desired, and if it could be done it would be done in this case, but I do not see how it can be done in this case.

Would it interfere with your line of thought if I should ask you another question?

Mr. Angell: No, not at all.

The Court: Suppose that Mr. Ammann, instead of doing business with the San Francisco Bank, had gone down to the Farmers and Merchants Bank and had exchanged the trust deeds for \$12,000,000, or whatever number of dollars or sums it is, and signed notes and the like, would it make any difference here if I had ordered them to deposit their securities in court to await the out-turn of this? Could I not have charged the Farmers and Merchants Bank, who did this at their risk, with the expenses of a special master for an accounting?

Mr. Angell: I would state my answer would be the same as with the San Francisco Bank.

The Court: Very well.

Mr. Angell: Unless there was some allegation that the Farmers and Merchants Bank were in-

solvent or wouldn't be able to pay a judgment which ultimately would be given against them and all the things that were required to order a deposit, I believe the answer is identical, and that is one of the [58] things we raised, your Honor, when the order was made to deposit into the registry, that it was entirely unnecessary, that the bank was entirely solvent, and any judgment that Long Beach got the San Francisco Bank could respond to it.

The Court: Let us assume the San Francisco Bank was solvent, but do I not recall that there is a history in the record here of a solvent Los Angeles bank having existed one day and suddenly one day it did not exist any more.

Mr. Angell: I do, but it is no miracle to me because under Section 26 of the Home Loan Bank Act it exactly provides that that thing can be done.

The Court: And all their liabilities transferred?

Mr. Angell: Why, certainly, your Honor.

The Court: You mean the United States or the new bank would not be here saying we do not owe that, the Los Angeles Bank owes it?

Mr. Angell: I can't see any difficulty with it at all. Of course that is the main issue in the case. To argue then here now would be futile. And, furthermore, I don't think we have the necessary evidence before the court to argue it. As a proposition of law we stand just that boldly and we are not ashamed in so standing. We think that it is legally 100 per cent correct. We may be mistaken.

Now the other point that I was making is, your Honor, that in the manner in which these fees are

being allowed [59] they are not being assessed against any particular part of the work of the master.

The Court: That is right.

Mr. Angell: I take it a master's bill is no different than anybody else's bill. If you buy merchandise I bill you for it and I am supposed to hand you a ticket and say that I sold you this and you owe me so much money and that is what you owe it to me for. I cannot see how a court can arrive at what the reasonable value of a master's services are unless it has some itemized statement of time—that is one of the elements—and the nature of the work that was worked upon.

It might even be possible the master may be doing for one a certain kind of work calling for one rate at a time, and then some other work at another rate. I can conceive of such a situation.

The Court: Mr. Angell—excuse me a moment—I see it is 3:00 o'clock. I have this other matter on the calendar.

(Other court matters.)

The Court: Very well, Mr. Angell.

Mr. Angell: The only other point that I was making is the necessity of specifying the services rendered in connection with each reference. We have three references here. Various parties in this action may be interested in different [60] parts of those references and not in others. It is only good business and only a fair and reasonable request as to those who ultimately will be charged with that,

if anyone, that the bill that they have to pay, that they have an opportunity to look at it and see for what they are being charged.

I do not mean by that an itemized account like a grocery will give you, but I do think the general nature of the services and the reasonable time should be given to the court because, while this court might have knowledge of its own because of its closeness to the case, an appellate court would have nothing upon which to base an appeal by any party in this case as to excessive fees.

The Court: Nor would some person who might desire to object.

Mr. Angell: That is correct. You are kind of in the dark without it. Now I think that that certainly is a reasonable request.

One more remark, your Honor. I stated that we were not wishing to object captiously, nor do we wish to keep Mr. Walker out of his fees. We have known Mr. Walker has done a great deal of work, and we hope that he is adequately compensated, but we do have our duty to our particular clients, and that is all we are presenting here, and I am assuming a situation, and with due respect to the court, that it might ultimately be determined that the court had no jurisdiction in [61] this case. I do not think that it is clear under the cases that the court has jurisdiction, and it has been vigorously argued by all parties from the defendants' side, that the court lacks jurisdiction of the entire case.

Assume that that ultimately would be determined. I am looking forward to the time in the situation

where allowances were made in this general manner and not assessed or any determination made as to whom those services were made for, as to what would be the situation with a case remanded in that situation with the court having no jurisdiction—and I take it that that would be the situation, although I may be mistaken; I have not exhausted the authorities; in fact, I have had little or no time to look into them—but I am picturing a situation, your Honor, which might occur in the future and might lead to much more litigation and might be extensive litigation, and only in the interest that we may avoid such, if possible, I am just thinking of a situation that it were held that your Honor were without jurisdiction in the whole case that it would be remanded for dismissal, and here is the registry of the court holding all this money and everybody swooping in on the registry and saying, “We want our money,” here are these payments being made out of these funds claimed to be general funds and no finding of any kind as to who they should be charged against, whether pro rata or in what manner, and it might take an interpleader action by the clerk of the [62] court in another action to determine what, if anything, could be charged against any of the claimants to all of those funds.

The Court: Well, in anticipation of that situation I have examined some of the various cases that have gone to the Supreme Court involving situations, not precisely like this because I have found none like this——

Mr. Angell: I don't think your Honor will.

The Court: —but situations where they finally concluded that there was no jurisdiction, but certain situations had developed. I am satisfied that the Supreme Court would probably remand the case to the District Court to ascertain to whom the various moneys on deposit belonged, because the Supreme Court of the United States I do not think, if they should just say that there was no jurisdiction, you could not by a mere mandate to that effect put everybody back into the position they were when this litigation started.

Mr. Angell: I am familiar with some of the line of cases and in a number of cases it has been done where from the record it appeared that parties had consented or by their conduct permitted that to be done. I can think of some parts of this case where maybe that would be exactly true, your Honor, where there had been a general consent.

The Court: There are cases even where they have held a court of equity has no jurisdiction but has taken possession, and then the Supreme Court or the appellate court will remand [63] it to determine who is entitled to the possession of certain assets in the possession of the court, because they do not just turn them loose like a bunch of jackals to start fighting in the street over it.

Mr. Angell: It would seem to me in this instance—I am just thinking out loud—that to determine who was entitled to it your Honor would practically have to come back and determine the very things which it would seem to me could be easily determined on this hearing, and that is the

amount of services rendered to each in these matters. At least that could be gotten out of the way.

The Court: If this were a final account, if this were the final account of the master, not only on the accounting but on the other matters that have been referred to him, if this were his final report and accounting I would then determine how much he had earned as special master in the accounting, how much he had earned as special master in the inspection, and how much he had earned as special master in the turn-over, and say his total value of services is so much, and so much is due from here and there, and so on.

But this is an interim report. This is an interim request. Neither I nor any person in this courtroom can see the ultimate end of the master's services or the ultimate end of this litigation. We hope that it may come. Everybody here, I am satisfied—I know that I am—is doing everything [64] he can to force the matter to a position where there can be some ultimate conclusion some day. But all he is asking for now is an interim amount, and it is my disposition not to charge anything against anybody, nor to allocate him any sum for any particular services in connection with anything, because they are all interrelated with one another, and not only are his hearings interrelated with one another, but they are interrelated with the entire litigation.

So I cannot say, and I should not, I do not think, in justice to either him or to any of the litigants, what the total sum should be as charged for particular services or against a particular fund.

Mr. Angell: I quite agree as to the total. However, I think that is all I have to call to the court's attention at this time.

The Court: Very well.

Mr. Bishop: Could I address the court on just one point about two minutes, your Honor?

The Court: Surely.

Mr. Bishop: What I was going to address the court on is his power. In the ultimate, if it were decided that there was no jurisdiction I think that that points up Mr. Angell's argument very much. The plaintiff brought this case in equity. That is the chance and the peril that he took, and at this stage in the proceedings, with that matter confronting [65] the court, he sought equity, and he has got to do equity. The court doesn't have to take a chance that the special master go unpaid, it doesn't have to take the chance that the clerk could be assessed, but the funds of the San Francisco Bank or the funds of any other party who didn't initiate this litigation are protected until this court's final decision is made.

We could not, and I don't think we would be heard if we addressed this court and asked for reimbursement, for instance, for the expenses of going East to attend the hearings before the National Board, or to bring it right down, what would happen if we applied for our expenses in connection with the preparation of the interrogatories for Mr. Fahey's deposition.

The Court: I have never been presented with that.

Mr. Bishop: We, and I believe soundly so, have not and at this stage of the game are not, going to attempt to have this court assess our costs that are a big burden on the defendants, who didn't start the litigation, about what Mr. Ammann did or what he didn't do, or about the turn-back—we were not involved in that. I mention that for the simple reason that that accounting between Long Beach and Ammann is something that we were not a party to. In fact, the record will show that the first order calling for the accounting was not signed by us. It was not even served on the San Francisco [66] Bank.

The Court: Let us not get into that now. If Ammann is going to account he is going to have to get into the books of the San Francisco Bank, and I do not need to prejudge anything to do that and I do not need to go beyond the fifth grade to know that.

Mr. Bishop: No, your Honor, but that illustrates my point. My point is that they have sought that remedy, they got it, they got the Long Beach Association back, whether it was by political power or their own agreement, anyway they accepted it and brought it to this court where they started asking for relief. Therefore, can't I assume that they were prepared to fight their case all the way and to advance their costs, and that they can't use the defendants' money until they have won. They sought the discovery proceedings. We didn't seek them. They have also sought other things here that have been referred to the special master.

The Court: Of course there are some other matters that you overlook, Mr. Bishop, and that is that it is undisputed on the date that the case was taken over, when the Bank was taken over, that they were solvent, and it is undisputed on the date they were given back they owed the San Francisco Bank \$6,300,000. That is, they dispute it, but there is a note in there to prove it.

Mr. Bishop: But there was \$6,000,000 worth of assets [67] likewise, or there were \$14,000,000 in assets likewise, some of which they didn't have.

In other words, there is an offset there.

But I am very serious, your Honor, in the point that he who seeks equity and seeks to pursue these various remedies until there is an adjudication has no right to claim any amount of our money, and there is a very close point now that our security is being imperiled. However, if that is assessed at this time, that is, the judgment goes as against those who brought these proceedings, that does not deprive the court of the power to eventually assess as proper taxable costs.

The Court: May I ask you a question?

Mr. Bishop: Yes.

The Court: You heard the special master's statement. Do you have any views to express concerning the amount that should be allowed at this time?

Mr. Bishop: Your Honor, I don't feel that I should.

The Court: Yes or no?

Mr. Bishop: Mr. Walker is associated with me

and that is why I purposely refrained from addressing the court, and it has been agreed between counsel that I take no part in it except this phase of the argument. I am not talking about fees in any sense except where they are placed at this time.

The Court: Very well. [68]

Mr. Angell, do you have any views to express concerning the value of the services earned by the special master up to this time?

Mr. Angell: If I expressed any views, your Honor, they would be worthless. I have never been a special master. I have not been in on a great deal of the work that was done before I was ever in the case, and I would not care to, out of justice to Mr. Walker and to my client, express myself. I would ask not to be asked to do that.

The Court: Mr. Fitting, do you have any views to express concerning the amount of fees that have been earned by the special master up to now?

Mr. Fitting: No, your Honor.

The Court: Do you, Mr. Tremaine?

Mr. Tremaine: No, your Honor.

The Court: Do you, Mr. Westover?

Mr. Westover: Only that I think the laborer is worthy of his hire.

The Court: Do you have any views as to a specific amount?

Mr. Westover: No, your Honor.

The Court: Do you, Mr. Chapman?

Mr. Chapman: As to a specific amount, no, but I think it should be on account, your Honor. But

for the record I would like to answer some of the points made. I will try to [69] be brief.

The Court: You need not answer all those points.

Mr. Chapman: I need a little time for argument, your Honor, but on the question of the amount, I have nothing to say.

The Court: I think that the special master is entitled to some compensation. I do not think that Mr. Angell's argument is correct or sound. It is my purpose to allow him a fee at this time and to charge it against the funds on deposit in court without reference to whose money it is ultimately chargeable against.

Mr. Chapman: Your Honor, I need to make a record for possible appeal. I can be brief, but I think the points have to be made. I am sorry that you have to listen to it, because I think you are probably convinced already. Nevertheless, having had the experience of having to defend one of your appeals in this matter, and jurisdiction is a vital concern to us, I would like to make a few points. I will be as short as possible.

The Court: Three minutes?

Mr. Chapman: I don't think I will need that.

The Court: Why not just state your points then?

Mr. Chapman: All right. I will do that.

The Court: The answer to the question I asked is "no" as to the amount of the interim allowance? [70]

Mr. Chapman: Yes, as to the allowance, except

that whatever is allowed should be on account and not an allowance in full.

The Court: I do not intend to make any allowance in full; I intend to make an interim allowance. That is all the special master has asked for.

Mr. Chapman: On amounts, I don't think I have a view that I can state.

The Court: Very well.

Mr. Chapman: You have asked me to state the points. I want to do that.

First, the San Francisco Bank too, whatever collateral, whatever money, whatever assets, they could subject to the outcome of this litigation. They took them to a *lis pendens* which covered all of the trust deeds subject to the pending litigation and subject to a restraining order of which they had full knowledge.

The Court: That is to say, all of the trust deeds that were not only on deposit here, but all of the trust deeds which were transferred to San Francisco and ultimately came back here and were released in lieu of the bonds.

Mr. Chapman: Exactly.

Another point: They claim they have no interest in the \$1,000,000 in court brought in by the intervenors because they say those proceedings did not involve them. But the [71] notes are still here and every one of those notes bears on the back of it an absolute assignment to the San Francisco Bank by Ammann, and that assignment is cancelled by various methods, depending on each individual note. On some of them they used rubber stamps. There-

fore, when the intervenors put the money into the registry of this court and took their clear titles and departed, among their claims, which your Honor by his order preserved for future adjudication, was whether or not the San Francisco Bank ever got any title to those notes by the assignment from Ammann, and if they did get any title whether or not they part with it by the rubber stamp or other cancellations.

To listen to Mr. Angell and Mr. Bishop, you would think that the San Francisco Bank didn't have a chance of ever losing a lawsuit or any claim against them that amounted to anything. But the only money that they had to use to give to Ammann, or whatever they did with it, was money that less than three months previously they seized from the Los Angeles Bank. Their right to seize that money is at issue in this litigation and will, of necessity, be in issue until the entire litigation is decided.

They say they are not concerned in the accounting, that it does not make any difference to them, but that \$6,300,000 item goes into every item of the accounting. It goes into the deposit of the insurance premiums in court, it goes into [72] the question of whether Ammann owes them the \$6,300,000 or whether we owe it.

The Court: I do not see how the San Francisco Bank can escape being involved in Ammann's accounting.

Mr. Chapman: We think so, too. They have attended every hearing, they have argued the matter

before your Honor, they have argued the matter before the special master, they are an active participant throughout the accounting, and the records will so disclose.

Another point: This litigation is nearly four years old. I think it is unreasonable that the special master or counsel, or any of us, should need to wait to the end of the litigation before you can make any allowances on account. The special master's services were required, and they were required by your Honor's own orders, first on the accounting, on the turn-back, on the discovery, and on all the other proceedings. The orders enlarging the special master's powers were made at your Honor's own suggestion. Their argument amounts to the fact that you can't pay your own officials that you have appointed out of funds in the clerk's hands.

The Court: May I interrupt to say that while they were made at my suggestion, they were made because it appeared to me the necessities of the situation required it.

Mr. Chapman: And events demonstrated the necessity.

The Court: And on both occasions when the special master's [73] powers were enlarged.

Mr. Chapman: And the subsequent events demonstrated the compelling necessity.

It is interesting to go through the special master's records, to hear the argument here you would think nobody asked the special master for anything, but when the discovery of their documents is instituted they have made more applications to him

to seal and protect their documents, they have utilized his services, they have brought matters before your Honor for determination, often at their suggestion, on rulings on what he was doing in the inspection, in the accounting, and in the other matters. It is only when it comes time to pay that he is somebody else's special master, that they didn't want him, and that they didn't have any part of him. That has never been our position.

I am sorry that I cannot help you on a suggestion as to the amount. The reason for that I think is obvious. My own opinion as an attorney might be one thing, my clients' opinion might be something else. We are never unwilling to pay whatever your Honor thinks a special master is worth. But we don't think that all of it should be fastened on Long Beach. Neither do we think that this is the time to determine what amounts are to be put on what parts.

The Court: That is all your points?

Mr. Chapman: I have two more. [74]

The Court: Very well.

Mr. Chapman: I am concerned with an appeal in this situation. Perhaps the burned child dreads the fire. But we have had the burden of trying to sustain the jurisdiction of the court, to protect the titles to homes of our borrowers, a thing of vital necessity with an institution such as ours, and recently to keep our institution from being seized again. I am very much concerned that a proper record be made, and it is my own belief, after reading the objections, that the power of the court,

or the jurisdiction of the court, is to be tested not only on the preliminary injunction, not only on the Los Angeles Bank's fees, if any are allowed, but particularly on the special master's application. We think that when your Honor is made a defendant in a writ on a former allowance of fees that the outcome of jurisdiction is greatly influenced by the responses and the record that was made in that matter before the Supreme Court. I think that there is a sufficient record to justify an allowance on account, not in full, and an allowance against the funds generally and not as to any particular part, and I am wondering whether or not this order should now become an appealable order. That is something that the special master should recommend to your Honor on.

The Court: That is to say, a special master's finding?

Mr. Chapman: Unless you put in a finding of 54(b), the [75] whole matter would not be appealable, in my opinion, but it would go over until the end of the trial for adjudication.

The Court: I do not think I would be justified in making any finding under 54(b) that this is a final matter.

Mr. Chapman: In that instance the record is in much better shape than I have anticipated.

The Court: It would be completely unnecessary and unjust to everybody in this case, were I at the present time to make the findings which would be required to make that a final order as to the value

of his services with relation to the particular things which he is now in the middle of doing.

Mr. Chapman: That was my next point, the necessity for findings, if you did make it a final appealable order under 54(b).

The Court: I cannot see how it can be done or should be done.

Mr. Angell: If your Honor thinks it can be done, I can make a motion now which will make it appealable. I would move that the court release our funds of impound.

Mr. Chapman: That motion has been made and denied on previous occasions.

The Court: The motion has been made and denied. It is out of order. It is given without notice, not in compliance with the rules of the Code of Federal Procedure or the local rules. [76]

Mr. Chapman: On the question of accounts, your Honor, it seems to me that the special master's services are a matter of results and quality rather than quantity. I do not see the need for an itemized time schedule of so many minutes doing this and so many minutes doing that.

The Court: I think it would be a lot better if that were here, but it is not here.

Mr. Chapman: I do not think that that precludes you from making an allowance on account.

The Court: I do not think so.

Mr. Chapman: Particularly as it would not be final or appealable. That covers my points, and if there are to be no findings or allocation as to parties and the matter is not to be appealable, I feel much

better about the record than I did during the argument, and I will not need to go into all of the other questions of the San Francisco conflicting claims, except to say that every asset that San Francisco says is their security they got from Ammann and they used seized Los Angeles Bank money to get it with. If that doesn't make conflicting claims of at least three different parties, there are no such things as conflicting claims in interpleader.

Those are all the points I need to make.

The Court: Has anybody else anything to say? If not, I think we will have a few moments recess.

How long are you going to be? [77]

Mr. Westover: About three minutes, your Honor.

The Court: Very well.

Mr. Westover: I think, first, I would like to state the position of the shareholders that we did institute the litigation. We certainly have no objection to the payment of the special master because we do feel that his services are worth while, that the laborer is worthy of his hire. As he expressed it rather facetiously this morning, there have been some hearings that were like a three-ring circus, and we rather think that even the ringmaster of a three-ring circus is entitled to some fees, even if only a third.

I think the stipulation this morning covered it thoroughly, that our failure to respond to the pleadings that were served upon us this morning, even though they were served after we got into court and after your Honor called the matter, should not

constitute in any way an admission of any of the allegations therein, many of which we feel are factually incorrect.

We feel that the San Francisco Bank is involved in three of the major things that the special master has had under his consideration: First, the accounting, which Mr. Chapman has already covered—and I might add one additional point there, and that is that the question of stock in the Los Angeles Bank, the original stock with about \$380,000 and the additional purchases of Mr. Ammann are all elements of [78] that accounting which the San Francisco Bank, at least we feel, would probably be——

The Court: Let us not detail them. I have expressed myself again and again today that to me, in my view, the accounting is inextricably interwoven with the San Francisco Bank.

Mr. Westover: I think there is no question about that.

Likewise, the discovery proceedings are inextricably interwoven.

The Court: In connection with that, I have the recollection that the discovery proceedings are the result of a motion for a summary judgment by the San Francisco Bank.

Mr. Westover: That is correct.

The Court: They are the moving parties.

Mr. Westover: And likewise the——

The Court: Which was the basis of my question to Mr. Angell a while ago as to whether or not the

one who seeks relief is the one who should bear the total cost.

Mr. Angell: Well, your Honor——

The Court: You have answered it.

Mr. Westover: They engendered the discovery proceedings.

Likewise the interrogatories of Mr. Fahey that have been propounded by the San Francisco Bank have necessitated further discovery. [79]

The Court: I have not had the special master sitting as a master there——

Mr. Westover: The point I am making is that you again have given a slight continuance again to enable us to seek the records that were opened by the San Francisco Bank's interrogatories proposed to Mr. Fahey.

Likewise we feel the official defendants are equally involved, I think both in the accounting of Mr. Ammann, etc., the order, the discovery, the interrogatories of Mr. Fahey, all go to the official defendants.

I would like to clarify one thing that I am afraid is creeping into the record and I think should be clarified, and that is we frequently speak of the note of \$6,300,000 as of the Long Beach Association. That is inaccurate. It is the note of Mr. Ammann which has been signed by him. We do not concede that it is the Long Beach Association's note.

I think one other thing, and that is this equity matter, and the ascertainment of fees, including special master's fees, are all matters coming within

the purview of Mr. Ford's letter of April 27, 1949, that everything would be determined here by litigation, I think in controversy, before your Honor——

The Court: Adversary proceedings.

Mr. Westover: Adversary proceedings; yes.

The Court: On fees. [80]

Mr. Westover: On fees particularly. And in that connection I will direct Mr. Bishop's attention to the response that we made here just a few days ago in connection with fees in which we suggested that San Francisco follow the procedure and submit their costs and fees to this court for payment out of the fund pursuant to Mr. Ford's letter. That is in our response, Mr. Bishop.

Thank you.

The Court: Mr. Tremaine?

Mr. Tremaine: Like most of the others, I am quite willing to have the master paid as long as it doesn't come out of the pocket of my own client.

Mr. Wallis' cross-claim and interpleader here has been indirectly referred to by various parties as in the nature of interpleader. He does claim the money, your Honor.

The Court: He does claim the money?

Mr. Tremaine: Yes, your Honor.

The Court: Yes. It is in the nature of interpleader.

Mr. Tremaine: That is right. I just didn't want to let the record stand as it was.

The Court: Very well.

Mr. Tremaine: Mr. Angell and Mr. Bishop made the point that with the deposit of a considerable

portion of what is in the registry that it is in the nature of security. I would like to challenge that statement, not as to its [81] accuracy but as to having any effect upon this proceeding, because I think the argument is directed to a situation where a third innocent party, not party to the litigation, has security. I don't say that it would make any difference here whether the San Francisco Bank's money was its own money or was here as a result of security for one of its loans, assuming for the purpose of argument only that the loan was good, which I don't admit.

Then I was quite interested in the case which had been cited in opposition here, one of the few we were able to read, *Rauer v. Hatfield*, a Ninth Circuit decision, recorded in 295 F. 48. That was a suit in equity by a trustee in bankruptcy. The plaintiff won in the lower court. It was reversed in part by the Ninth Circuit. It had to do with the possession of shares and assets of a corporation. The District Court fixed the master's compensation under the equity rule and the court pointed out how broad the court's discretion was. And it makes the distinction that I see running through a number of cases, that the court has a discretion to assess costs of a master in the first instance as distinguished from the final hearing. I think that has been in the argument, but I don't think it has been brought out in clear black and white.

Now the court stated in that decision cited by, I think it was Mr. Angell or his colleagues, at page 52: [82]

“It is our opinion that the order of the District Court, in so far as it requires the payment of the master’s compensation to be paid by Rauer in the first instance, must be upheld. In recovering his costs, Rauer may include the sums which he was directed to pay and must pay the master.”

The point is that even though Mr. Rauer, the defendant, won on appeal on the main issue, he still had to contribute the part that the court in its discretion thought was fair in the first instance. Then it became an element of costs on final recovery under the final judgment.

That is all I have, your Honor.

The Court: Mr. Fitting?

Mr. Fitting: We are willing to stand on our memorandum previously filed, your Honor.

The Court: Mr. McKenna?

Mr. McKenna: No, thank you, your Honor.

The Court: Anybody else? (No response.)

One thing in connection with fixing the master’s fees in this case is a factor which is not ordinarily present in a reference to a special master. I do not have in mind the indispensability of the talents of Mr. Walker, but I do not have in mind that in this very complex and novel litigation that no person could serve as a master unless and until they became familiar [83] with the whole proceedings and all the variety of issues and complaints and contentions and positions of the parties.

It would be almost useless for a person, for in-

stance, to sit in as a special master on the inspection of documents and not have known the whole history of the litigation and not be thoroughly familiar with the thousands and thousands of pages of pleadings and contentions of the parties, and likewise the same is true in connection with the accounting of Amman. What good would it do to have someone, no matter how brilliant or great he might be, to move in as master in connection with the accounting of Ammann if he had not had an opportunity to read and if he had not, in fact, read and understood all of the allegations and assertions which were made at the inception of this litigation, as well as the legal contentions of all of the parties, including, of course, the contentions consistently made throughout here on behalf of certain defendants that the court had no jurisdiction. So that is a factor here which must be taken into consideration which ordinarily does not exist in connection with a reference to a special master and which has certain peculiar values upon which a price cannot be fixed.

I think that I may say that it has a value to all the counsel in the proceedings. How utterly futile Mr. Bishop or Mr. Fitting would feel making an objection concerning the [84] inspectability of a document to a person who did not have the familiarity with this whole proceeding that Mr. Walker has and has had from the beginning. And how utterly useless and frustrated the discoverers or those seeking discovery would feel stating to the master that they desired to see such-and-such a document in such-and-such a file when the special master had neither

opportunity nor has actually familiarized himself with these whole proceedings.

And the same is true in so far as the official defendants are concerned. Certainly the time of counsel and fees would have multiplied immeasurably in this case had you had a person acting as special master who, even with all the talents which one might consummately wish would exist on the part of every person who sat in a judicial or quasi-judicial position. I think that the fees that I have allowed up to now and the fees that Mr. Walker has been requesting are perhaps out of the ordinary in amount in so far as special master's fees are concerned. I certainly have felt that I have been justified up to now in compelling Mr. Walker, who is a man not without experience and who certainly is not a spring chicken or fresh out of law school, but is a mature man and entitled to go about his way of practicing law, to require him to devote the time that is necessary in connection with this matter. It is impossible for me, or any other person, even though he might have the gift of tongue, to [85] place upon any bare or dead record here the situation that exists at each session of this court in connection with this litigation, or that exists at each session of the special master's hearings. The matter of the tensions and the contentions of the parties simply cannot be described to the point where they can be relived by a person who is presiding in an effort to do justice between parties, and certainly I speak as one perhaps with more authority upon that

subject than any other person connected with this litigation.

So I feel that I am justified in making an allowance to the master on account.

As far as the contentions which were made by Mr. Angell and the objections which he asserted are concerned, I think that I indicated during the course of his argument by my colloquy and discussion with him my attitude toward them. It is not my disposition, and I shall not at this time attempt, to assess the value of the special master's services up to this point in connection with any of the things which have been referred to him. I shall not at this time assess any sum against any particular fund or any particular party to this action. That can best be done in justice to all parties and in justice to the master at the conclusion of the master's services.

I do feel justified in awarding him a sum on account at this time as an interim allowance, and assessing it against [86] the moneys on deposit in court without any further identification of the sum from which they should be paid or the parties who should pay it or the party who should pay it or the particular fund from which it should be drawn.

As to the amount, I am of course as perplexed as any counsel. I dare say that if counsel were to estimate variously the value of the services—and all of you are lawyers of experience and all of you, I am satisfied, are lawyers who appreciate the complexities of the litigation and the difficulties which are, after all, faced by one who sits in the position of the

special master in this case—I dare say that the sums would be astonishing in their variance if it were fixed as reasonable interim allowance.

Mr. Walker has suggested the total value to his services as \$70,000 some-odd to date. I do not wish to be understood, regardless of what I have said or what allowance I will make or will say, as indicating any value, any fixed value, for his services to date. That, in my judgment, can only be done when they are ultimately concluded. So that any interim allowances made here which will take into consideration the special features of the requirement of his services, as I have indicated at the beginning of my remarks, to wit, someone who not only is familiar with the litigation but has the capacity to be familiar with it, some one of his standing and stature as a lawyer and his age in the community, the fact [87] that it has taken perhaps all of his time, and as I see—I do not see how he could afford to engage in any extended litigation, and extended litigation is the most compensatory litigation—certainly he has time to run up to the Municipal Court on some matter, or perhaps the Small Claims Court where they do not allow lawyers, but I do not think that that is any measure or standard of compensation in this case, nor is it a matter that should be taken into consideration in figuring what he has been or might be deprived from earning.

He is somewhat in the situation, I believe, of the lawyer who is mentioned in one of the California cases, the name of which I have forgotten, but which is an old case, where a client sued for the return of

his money on the ground that he had paid a retainer and the lawyer defended on the ground that he had earned his retainer when it was paid. Mr. Walker, by his appointment here and the duty he owes to the court and the litigants in this case, is almost precisely in the position of a lawyer who has been retained. He owes and he has demonstrated in this case that his first obligation, as far as practicing law or otherwise earning his living is concerned, is to the litigants in this case and to this case and all its features. Those are things which I think, like one of the witnesses on the stand said, cannot be measured like you buy eggs or sell coal.

The order of the court will be for an interim allowance [88] to Mr. Walker of the sum of \$15,000, payable generally from the funds on deposit in court without the allocation thereof to any particular fund or charging thereof to any particular sum.

Mr. Walker: Your Honor, on the previous order that was made under Rule 7.

The Court: What is that?

Mr. Walker: On the last order the requirement of Rule 7, requiring service on counsel and settlement of the order was waived since it was the court's own order. Is that the course to be followed on this present order?

The Court: I cannot waive anything for anybody. You have to get the waiver from counsel.

Mr. Walker: The court waived the requirement of compliance with the rule.

Mr. Angell: To protect the record, I am going to request that we be served with the order and the

usual stay because I don't know what position the Bank's counsel will take.

The Court: What stay? There is no execution here. This is money in charge of the court.

Mr. Walker: I will prepare the usual order.

The Court: What did I do in the last order, I waived Rule 7?

Mr. Walker: Yes.

The Court: Very well. I will waive it again. [89]

Mr. Walker: In view of counsel's request for the order, I will prepare the waiver and serve him.

The Court: I will still waive the requirements of Rule 7. It is money on deposit in court. There is no question here of execution on any fund. There is no question of staying any execution on any fund. It is an interim allowance, which is what I intended it to be, on account of fees.

Mr. Walker: Thank you, your Honor.

The Court: Otherwise the special master's interim report is approved.

The Clerk: What about the disposition of the other matters, your Honor?

The Court: As to the progress of inspection and as to the progress on discovery, the interim report is approved.

The Clerk: Are we to keep No. 5 on the calendar?

Mr. Chapman: I think that has been continued from time to time.

The Court: As to how the inspection of San Francisco Bank is progressing?

Mr. Chapman: Yes. I suggest that that be con-

tinued for 60 days or some such matter.

The Court: He has made an interim report.

Mr. Chapman: That is No. 6 and No. 7. No. 5 is a matter we keep pending.

The Court: No. 5 is the hearing on his report which he [90] has filed and which was noticed on how inspection is progressing, is that not correct, Mr. Walker?

Mr. Walker: I think originally it came on a little differently. I was not going to make a report on the progress of the discovery proceedings. That has been continued from time to time and now I have made my interim report on other matters which included also the discovery proceedings.

The Court: Very well. I think on the matter of the discovery proceedings, Item No. 5, that will be continued for 60 days for further progress report on inspection. The present interim report is approved and is continued until that time for further report.

Item No. 6, the interim report of the special master on discovery proceedings, is approved and the matter of further report on discovery proceedings is continued until the same date that I continued the other matters to, which will be July 24, 1950, or until such date as the master in the meantime may file a further report.

In other words, maybe he will complete discovery. Maybe he will complete the accounting before then.

Mr. Tremaine: Does your Honor want that 60 days to begin on Monday, the nearest Monday? I think that would be the 8th.

The Court: The nearest Monday.

No. 5 is continued until May 8th, at 10:00 o'clock a.m. [91] No. 6 is continued until July 24, at 10:00 a.m. That is to say, No. 5 is approved and the interim report and further matters concerning the proceedings are continued until May 8, and No. 6 is approved as to the interim report and further proceedings continued until July 24, and as to No. 7 the allowance is \$15,000 on account of the interim report.

Is there anything else?

The Clerk: That is all, your Honor.

The Court: Court is adjourned.

(Whereupon, at 4:00 o'clock p.m., court was adjourned.)

[Endorsed]: Filed March 29, 1950. [92]

Los Angeles, California

October 25, 1950—10:00 o'Clock A.M.

* * *

The Court: The reason that I am inquiring is because of the hearing on February 10th, when Mr. MacGuineas gave assurances that he was now in charge of the case and that there would be no delaying tactics of any kind on the part of the persons he represented, and gave the court to understand that every effort would be urged to expedite the accounting.

I signed the order, the terms of which were settled, on February 10th. Incidentally, I would like the record to show that the records and files

have gone to the Circuit Court of Appeals in this case and the court is considerably handicapped by their absence. I do have here, however, from the clerk's judgment docket, I guess it is—what do you call [10*] this, Mr. Clerk?

The Clerk: Judgment docket.

The Court: —judgment docket, a copy of the interim order concerning the accounting of Ammann, which order was signed and which was dated the 10th of February. I think I signed it that day at the conclusion of the hearing.

I fixed a time for the resumption of the accounting in it. That is now almost nine months ago.

Mr. Fitting: If the court please, I think it breaks down into two periods. There is the first period between February 10 and August 15, when the FBI accountant started work. As to that period, I am quite certain that there has been no delay of any sort on the part of the government.

The Court: Now it appears that the time the accountants are spending down there is something less than 20 hours a week.

Mr. Walker: Twenty-eight, I believe, your Honor.

The Court: Twenty-eight hours a week which, in my judgment, is preposterous and ridiculous.

I have been informed that the Attorney General's office instructed the accountant, whom I appointed on their recommendation and suggestion, that there was no need for any hurry. Is that a fact, Mr. Fitting?

* Page numbering stamped at top of page of original Reporter's Transcript.

Mr. Fitting: Well, without the document before me I don't remember exactly what it was. [11]

The Court: Can you get that document?

Mr. Fitting: I think I possibly can.

The Court: I would like to have it, and I think that I am entitled to it because the Attorney General is an officer of this court and he made representations, and if there has been any deliberate effort on the part of the Attorney General or anybody in that office to delay this accounting, I must regard the United States as any other litigant and their counsel as any other counsel if they make deliberate delaying tactics to thwart the orders of the court, especially when they consented to them.

* * *

The Court: And even so, since that time, it seems to me that there should have been every effort to speed up that accounting, because regardless of any appeals in the matter there cannot be any doubt but what the Board itself ordered Mr. Ammann to return it and to account, and there cannot be any doubt but what this court entered a judgment to that effect, and there cannot be any doubt but what I felt the document [12] he filed was not an accounting. [13]

* * *

MURRAY B. MYERSON

The Court: Let me see the document.

(Witness passing document to the Court.)

The Court: Well, as an accountant, Mr. Myerson, would [33] you consider it necessary for an accurate accounting to show the title condition of the

(Testimony of Murray B. Myerson.)

piece of property at the time the loan was authorized, whether or not the person owned the property?

The Witness: I don't think it would normally belong in an accounting, your Honor. When we deal with note transactions that have been through so many changes, as these in this case, why, I think there is no limit to the information we might be able to gather.

The Court: If you are investigating a building and loan association, you would find out whether or not they had made loans on property to people who didn't own it, wouldn't you?

The Witness: Yes, sir. I would think the title would be extremely important, I believe.

The Court: And would it not be important in this case, if a loan is made to John Brown, to find out whether or not John Brown owned the property? I don't know that you would be required to make a title search, but to show whatever the records show? It is not your contention that the accountant here must make a title search?

Mr. Chapman: It is our contention, your Honor, he must state what is on the title policy that is in the file he is making the accounting from, and those title opinions were obtained by Mr. Ammann, and some of the things they show as to the condition of these titles, we think should be shown in this [34] accounting. I am only asking for information that is right in the file he is making his accounting from.

The Court: Is that correct? That in the files there are these title policies?

(Testimony of Murray B. Myerson.)

The Witness: I believe in most of the files I have seen, there is a title policy, your Honor. [35]

* * *

Q. Regardless of how many you have, isn't it important, Mr. Myerson, to know whether there is a first or second lien, or whether the borrower even owns the property?

A. There is a question as to whether that would be proper in the average accounting.

Q. When you audit an association, don't you report to whoever you make your audit to whether these are firsts or seconds, or whether they are liens on anything?

A. This is my first audit of an association. I can't speak from experience on it.

The Court: It would seem to me that would be information that would be required. [37]

The Witness: That may be so.

The Court: In other words, if no title had passed from a borrower and Mr. Ammann nevertheless made the loan on it, certainly it is highly important to know that.

Mr. Fitting: Might I make an explanation? This might shortcut it. We have never contended, and on the title question, our position is this. First, there are peculiar problems here, not as to who owned the property, but as to whether or not the deeds of trust are first deeds of trust or not, because there were certain refinancings involved in some of them.

The Court: That would be highly essential, it

(Testimony of Murray B. Myerson.)

would seem to me. If I am ultimately to pass on this accounting, and it shows there is a first deed of trust, and Mr. Ammann does something with it, the court has got to know whether or not he made it a second deed of trust and let something else get ahead of him.

Mr. Fitting: The position we have taken as to this sheet is that this is to get the basic information accountants can get from the files. As far as title status is concerned, we are not going to have Mr. Myerson and the F.B.I. accountants try to figure out the title status of each loan, but they are to work out that sheet. As far as the title condition, we haven't said we would give it or we would not give it at some stage of the accounting, once this part gets rolling along. [38]

The Court: It seems to me it can be obtained while you are going through each file.

Mr. Fitting: If the court please, that is the whole question. The title policy might say that it is——

The Court: All he has got to show is what the title policy shows.

Mr. Fitting: But, if the court please, here is the thing. The title policy might state Ammann's loan is the second loan on record. The accountant says only that Ammann's loan is a second loan. It was contemplated that these sheets be filed as part of the accounting. Then we have our accountant saying that Ammann's loan is a second loan. It is the contention of the Board, under the peculiar circum-

(Testimony of Murray B. Myerson.)

stances involved there, it was not a second loan.

Mr. Chapman: Even though the title company said it was?

Mr. Fitting: Even though the title company says it is.

The Court: I think they are entitled to whatever information is in that file.

Mr. Fitting: If the court please, that may be true. The only position we have taken here is that is a question that a lawyer ought to pass on.

The Court: Ultimately, but this is an accounting, and the court is entitled to have from Ammann whether or not he [39] made a loan on a piece of property where the title certificate showed it was a second loan, or a first loan, or what it was. It is merely a matter of recording what the file shows.

If there is any contest about it, the contest can be settled later on.

Mr. Fitting: It seemed to us that matter could be more expeditiously handled in the accounting at some later stage, by, perhaps, someone trained in that particular problem, rather than the accountants here.

Mr. Chapman: It is three years later now.

The Court: I don't think so, counsel. I think as long as they are going through the files and getting the information concerning these trust deeds, it will take one-half a minute longer, or perhaps two minutes longer, to write down what the title policy shows, whether it is a second or first trust deed.

Mr. Fitting: Of course, we don't always agree

(Testimony of Murray B. Myerson.)

with what the title policy shows.

The Court: I don't either, but this is Ammann's accounting, this is his record.

Mr. Fitting: As I say, it seems to me that the argument Ammann should show what the status of the loans are has cogency, but the only question here is more a question of how it is done, and we didn't think that the proper way was to have the F.B.I. accountants go through and say what the title [40] policy shows, thus indicating or giving an inference that that is what the loan actually was. We thought that the simplest thing——

The Court: If you don't agree with that, all you have got to do is to show—in other words, I think the title condition should show title policy dated so-and-so, showing so-and-so, whatever that is, and then the record is here for anybody to contest the validity of the title policy. On these other matters here——

Mr. Fitting: The other matters, if the court please, we have taken the position——

Mr. Chapman: Mr. Fitting, if you don't mind, I would like to have my examination of the witness continued.

Mr. Fitting: I thought I could explain to the court what our position was.

Mr. Chapman: Well, I have some questions I would like to ask the witness, if you don't mind.

The Court: Go ahead and ask them.

[Endorsed]: Filed January 29, 1951. [41]

In the United States District Court, Southern
District of California, Central Division

No. 5421-PH—Civil

No. 5678-PH—Civil

Honorable Peirson M. Hall, Judge Presiding.

PAUL MALLONEE, et al,

Plaintiffs,

vs.

JOHN H. FAHEY, et al.,

Defendants.

FEDERAL HOME LOAN BANK OF LOS AN-
GELES, a Body Corporate, et al.,

Plaintiffs,

vs.

FEDERAL HOME LOAN BANK OF PORT-
LAND, a Body Corporate, et al.,

Defendants.

REPORTER'S TRANSCRIPT OF
EX PARTE PROCEEDINGS

November 1, 1950

Appearances:

For Plaintiff and Shareholders Protective
Committee:

WESTOVER & SMITH,

1009 Pacific Southwest Building,

Los Angeles 14, California; by

WYCKOFF WESTOVER, ESQ.

For Defendant and Cross-Claimant Long Beach
Federal Savings and Loan Association:

CHARLES K. CHAPMAN, ESQ.,
17 Ocean Center Building,
Long Beach 2, California.

Appearing Specially for Defendant Ammann,
Individually and as Conservator; and for De-
fendant Fahey, Individually and as Commis-
sioner:

ERNEST A. TOLIN,
United States Attorney,
Los Angeles 12, California; by
PAUL FITTING,
Assistant United States Attorney, and
ARLINE MARTIN,
Assistant United States Attorney.

Also Present:

RONALD WALKER,
Special Master in Chancery. [65]

November 1, 1950—10:00 A.M.

The Court: We will call the 10:00 o'clock cal-
endar, Mr. Clerk.

The Clerk: No. 21443, Criminal, United States
v. William Wolfe Weisband.

Mr. Hildreath: Ready for the government.

Mr. Tendler: Ready, your Honor.

The Clerk: No. 5421-PH and 5678-PH, Consoli-
dated; Paul Mallonee, et al., v. John H. Fahey, et al.

The Court: Are you ready?

Mr. Westover: Ready for the plaintiff. Mr.
Chapman is in the hall. I will get him.

Mr. Fitting: Ready.

The Court: Very well. We will proceed with this matter and dispose of it before taking up the criminal case. I do not think this will take too long, counsel.

Mr. Tendler: Yes, your Honor.

The Court: This matter was put over until today leaving unsettled the matter of a form, I think, that the accountants were to use, but principally to ascertain from the Federal Bureau of Investigation the length of time it would take to complete the accounting and the number of men required.

I see Mr. Myerson is present. Would you resume the stand, Mr. Myerson? [67]

MURRAY B. MYERSON

having been previously called as a witness, having been previously duly sworn, resumed the stand and testified further as follows:

The Clerk: You were sworn before, were you not?

The Witness: Yes, sir.

Examination

The Court: I will say that yesterday afternoon Mr. Hood, the head of the local Federal Bureau of Investigation office, called on me and stated that he had received from Mr. Myerson an estimate of 15 men 60 days, 10 men 90 days and 5 men 6 months.

Is that right?

The Witness: Approximately right; yes, sir.

The Court: That the greatest number of men

(Testimony of Murray B. Myerson.)

that he would have available would be 5. I asked him to urge his office in Washington if they could not make available enough men so that it could be completed at the outside in 90 days, and he said that he would do what he could and that you would have the answer this morning.

The Witness: Yes, sir.

The Court: What is the answer?

The Witness: The answer is 7 men.

The Court: Seven men?

The Witness: Yes, sir; 5 that would be available on [68] Monday morning——

The Court: Next Monday?

The Witness: This coming morning, at Long Beach, the first thing in the morning to start, and 2 men to be added within a few days.

The Court: And the 7 to be kept continuously——

The Witness: Continuously on the job.

The Court: ——until completed?

The Witness: Yes, except in extreme emergency when something comes up over which they have no control.

The Court: Yes.

The Witness: And that would include the full working day, that is, our full 8-hour shift throughout the week, including Saturday, as we are now on a 6-day week. And those men of course wouldn't have—they would be prepared to work exclusively on that job and not have any other assignments so that we would like to have them assigned right there

(Testimony of Murray B. Myerson.)

at Long Beach for the six days and have records made available to them.

The Court: That could be done as far as your office is concerned?

The Witness: Yes, sir.

The Court: Well, that being the case, do the parties have any other suggestions at this time? I do not know what other alternative there is to compel Mr. Ammann to conclude [69] his accounting other than to bring Mr. Ammann out here.

Mr. Fitting: If the court please, if I might make two observations.

First, your Honor will recall when we were first talking in your chambers about putting the FBI on it, one thing that was contemplated was that the two parties would work along more or less together so that time would be saved and you wouldn't have the problem of the accounting being filed and then Long Beach needing an extended period of time to go back over them.

The Court: Yes, I remember that distinctly. It seems to me like it was my idea.

Mr. Fitting: Yes, I think it was your idea.

I might just suggest to your Honor that if too many men get in there that the more men you have in there the more it complicates that problem.

The Court: I think that that will work out all right. Mr. Myerson has testified that he has not had any difficulty with the Association or their accountants, and that they have extended full cooperation.

I will ask Mr.—are you Mr. Smith?

(Testimony of Murray B. Myerson.)

Mr. Smith: Yes.

The Court: I will ask Mr. Smith whether or not you could accommodate your accountants with that number of men so that you could work right along with them. [70]

Mr. Smith: Yes, we could.

The Court: Do you anticipate any problem in that respect, Mr. Myerson?

The Witness: Not at all.

The Court: So that when you are through everybody will be through looking at the books?

Mr. Smith: That is correct, your Honor.

The Witness: I think that with Mr. Smith's cooperation and the access to some of the schedules which he has prepared that we will move along very rapidly.

The Court: Very well.

Do you have any suggestion to make in that connection, Mr. Chapman or Mr. Westover?

Mr. Chapman: I would like to go into the question of information on the form for a few minutes, if I can have the exhibits that we had last time, with Mr. Myerson for just a moment. Or do you want to conclude the question of assigning accountants before you go into that?

The Court: I think that the information on the form can be worked out.

Mr. Chapman: May I have a minute or two on that before you rule?

The Court: Very well. Where are the exhibits?

The Clerk: Here they are.

(Testimony of Murray B. Myerson.)

(The exhibits referred to were passed to counsel.) [71]

The Court: Let me ask this: First, with relation to the accounting, on the matter of assigning the seven men as Mr. Myerson states, I suppose that that will probably take from 60 to 90 days or maybe longer to conclude it.

The Witness: I feel that the first week or two we will be getting settled. We will lose a little time in the first weeks, but I think we can estimate that we will complete it within 90 or 120 days.

The Court: With the seven men?

The Witness: Yes, sir.

The Court: After you get rolling?

The Witness: After we get rolling we will roll.

The Court: Very well.

Mr. Chapman: Your Honor will recall that the information that we asked was the dollar value of what Ammann had done. It isn't an "if" question at all. He did modify these trust deeds.

The Court: Yes, I remember the dispute.

Mr. Chapman: Now our point is this: There are many parties concerned in what he did. The Association and its depositors are concerned from an interest standpoint—what can they collect—but every individual borrower is likewise concerned as to what does he owe. Does he owe \$50 a month for the next 20 years or does he owe \$100 a month for the next five years? Does he owe 6½ per cent interest, as [72] the note calls for that he signed, or

(Testimony of Murray B. Myerson.)

does he owe 4 per cent interest for some indefinite period as Ammann says?

The Court: My recollection is that the form provided and settled upon which Mr. Myerson was furnishing, was that that information would be furnished.

Mr. Chapman: In total amount it would not, your Honor.

The Court: Not in a total dollar amount. That is a mere matter of calculation and extension.

Mr. Chapman: Let me make my point. We have accountants for the Association. They represent the depositors. In other words, they represent the lender. But I think throughout this litigation the Government has been all too prone to completely forget the borrower. They didn't bother at all when his titles were all tangled up and he had to hire a lawyer and come into court and try to clear his title so that he could sell his property. Now they are not bothering at all on stating to him in simple dollars whether it is worth his getting into this lawsuit or not. When this accounting is filed, we are going to have to notify every borrower whose trust deed has been changed that the court is going to rule on this matter and that as the Association's attorneys we can't represent you, we are representing the lender, you are either going to be bound by that ruling or be in default and we will fix the terms of the loan on your home as the court fixes it, or you are going to hire your [73] own attorney and

(Testimony of Murray B. Myerson.)

come on in. And there will be hundreds of those people.

The Court: Eight thousand borrowers?

Mr. Chapman: I don't think 8000 of them have been modified, your Honor. There are about 4000 loans.

Unfortunately, when you are dealing with an institution the size of ours you have considerable sums of money and quite a few thousand people.

The Court: Yes, I understand.

Mr. Chapman: Now I think that that borrower is entitled, when he picks up this sheet and discusses his loan, to know where he stands.

The Court: Have you another one of those sheets with you?

Mr. Chapman: No, I have it right here as an exhibit, your Honor.

I think he is entitled not to have to hire his own accountant and make the calculations, nor is he to expect that we who are lending him the money, who are adversely interested, are to make that calculation for him.

I don't think that it is any part of our duty to make any of the calculations in Ammann's accounting that are necessary for the people that dealt with Ammann to decide whether they need to have a lawsuit with Ammann about the loan on their home or not. [74]

Let us suppose that we make a calculation and take a different theory than Ammann took when he made the modification. The borrower says, "Well,

(Testimony of Murray B. Myerson.)

I am doing business with the Association, whatever they say is all right with me." We are then interpreting Ammann's contract against that borrower to the advantage of the Association.

You see, I have to live in that town, your Honor. I have been there all my life. I meet those people, and when questions come up at the Association, an awful lot of them get referred over to me, and I don't want to say to that borrower, "I don't know what Ammann did but here is the way we calculate it." The natural question they will put up to me is, "Well, why doesn't the Government calculate it if they are the ones that did it," and I want to be able to say to those borrowers that I made the best try I could in court to have that done and either I was or I was not able to get that kind of an order.

The Court: If there is anybody in Long Beach that does not give you an "E" for effort I think they should come up and sit in this lawsuit for a while.

Mr. Chapman: Thank you, your Honor. I hope that is deserved.

But really I only bring these things up when I think there is a very grave necessity. I wouldn't be wasting your time and mine on this if it wasn't an essential for the [75] future operation of that institution.

We have not tens but hundreds of thousands of dollars impounded in checks that we haven't been able to cash while this accounting dragged along because those checks were tendered to us on the

(Testimony of Murray B. Myerson.)

basis of some modification that Ammann made, and until it is passed on here if we cashed those checks we would estop ourselves for the future 20 years for the term of those loans.

Now that is a very serious situation to this institution, and in asking for these calculations we are asking for nothing——

The Court: The only thing that appeals to me about it, Mr. Chapman, is this, that it is a matter concerning which there will be a dispute after the accounting is over.

Mr. Chapman: Unquestionably.

The Court: It would seem to me then that as they are going along, Ammann's accountants (that is the Government accountants) could make their calculations and your accountants could make their calculations on these extensions and if they agree that is the end of it. If they disagree, then it is a matter for settlement.

Mr. Chapman: That is right.

The Court: Would that require too much more additional work, Mr. Myerson?

The Witness: I would have to run one of those through. [76] I think it would require quite a bit of work, and it would extend our estimate considerably.

Mr. Chapman: Your Honor, I don't think there is such a thing as too much work to account for somebody else's money.

The Court: My point is, I want to get this accounting done. It has been almost three years since

(Testimony of Murray B. Myerson.)

this institution was turned back, and this litigation certainly can never be concluded until that accounting is done. I have a feeling that if the accounting were completed that maybe the litigation would move along a little faster in all departments.

Mr. Chapman: I think you have a point there, but it should be completed so that the borrowers know what they are doing when they come and look at it. We have to notify them, and the result will be that we will be making part of Ammann's accounting for him. That is the essence of it. Just like we had to clear up Ammann's titles for them so that our borrowers could have their homes.

The Court: I do not think it is a matter of you making Ammann's accounting for him, but I do think it is a matter that after the accounting is finished that your accountants will make their calculations and come in and insist that the extended figures are such-and-such.

Mr. Chapman: That is true.

The Court: Now, then, you will have to go back, in so far as Ammann is concerned, and have them check the books [77] and records to see whether or not the figures are accurate.

Mr. Chapman: That is right.

The Court: So it is not a matter of the principal that is to be settled by the accounting here, it is the matter of the calculations.

Mr. Chapman: Well, if we are in agreement, certainly they should make their calculation when we make ours and clear that area out of the area

(Testimony of Murray B. Myerson.)

of dispute; and if we are in disagreement we ought to find it out as we go along and know why.

Mr. Fitting: If the court please, on this question, the way the form is set up now we show what Ammann actually did to the loan. Now suppose the court finds that the modifications are proper. Then all the computations just go out the window.

The Court: No.

Mr. Chapman: No, I disagree with that.

The Court: One of the factors probably to be taken into consideration as to whether or not the modification was proper was what the result of it was.

Mr. Fitting: The result is simple. It cut the interest rate from such-and-such and reduced the payments.

The Court: But how much less did he give back in value of assets than what he got? In other words, a trust deed for \$8000 bearing interest at 6 per cent and payable in the [78] term of 15 years is worth so much money. It is worth a different value than a trust deed for \$8000 bearing interest at $4\frac{1}{2}$ per cent and due in 30 years.

Mr. Fitting: But the question is, whether he had the power to modify them and whether he exercised the power reasonably.

The Court: Suppose I decide that he did not have the power to modify them and he did not exercise it reasonably, then we have to go and have the accounting all over again.

Mr. Fitting: No, your Honor. Then it is very

(Testimony of Murray B. Myerson.)

simple. Then the original terms stand and Long Beach is whole.

The Court: Then how much money does Ammann owe? That is the thing.

Mr. Fitting: He owes the difference.

The Court: And how are you going to find that out except by these calculations?

Mr. Fitting: There will have to be calculations, but here is the point——

The Court: Then I think the calculations might just as well be made as we go along.

Mr. Fitting: But why, as a part of showing what he did, must we calculate what would be the damages if he had done something else? The accounting is supposed to show what he did.

The Court: It reduces itself down to a matter of what [79] the value of the asset was on the day it was returned, as I have pointed out. A trust deed with a lesser interest rate and a longer term on an identical face amount has a different value than a trust deed at a larger interest rate in a shorter term.

Mr. Fitting: Your Honor will remember we once had an argument about whether all these assets should be appraised, and our position was that all we had to show was what he gave back and that we weren't getting into questions of value.

The Court: Maybe we can get away from an appraisal entirely. I was not inclined to think that it should be granted. But it seems to me, while it is being done, that the matter of extending these figures is a mere matter of mathematical calculation.

The Witness: It goes into maturities there, your

(Testimony of Murray B. Myerson.)

Honor. I pointed out the other day that maturity is not stated in most cases, and they are not too easily ascertainable.

Mr. Chapman: How is the borrower ever going to figure out what happened to it? I think that is an accountant's job, your Honor.

The Court: Well, I do not know.

The Witness: The notes in most cases provide for a certain payment every month until the loan is paid off, and we have tried in a few cases to determine what the estimated maturity was. I believe that we finally worked it out, but [80] it wasn't too simple.

Mr. Fitting: If your Honor is contemplating that work, I might suggest to your Honor that perhaps Mr. Myerson's estimate might be longer.

The Witness: I felt originally that after we completed the form that we were working on now it was possible at that time to go through all of these note transactions from the form and make the computations then.

The Court: You mean the extensions?

The Witness: The extensions then, if it were agreed that we were going to do it. I don't know whether it can be done as we go along. What I mean to say is, I don't know whether when we get through all the information we will need will be on the form or not. I haven't studied it over too carefully lately.

But if that is possible, if the form will give us all the information we need to make our computations after we complete all the forms on the loans, then

(Testimony of Murray B. Myerson.)

it might be a matter that we could let go until then and have it decided.

Mr. Chapman: My point, your Honor, is that somebody ought to tell the borrowers what they have done with his loan and how much he owes, and it isn't our job. We didn't make the modifications.

The Court: On this form, I have already indicated—and I will make an order in that connection—that the title [81] condition should be shown, and that this information in the lower left-hand corner here headed, "Interest at Original Rate on Original Loan," and the items, "Until Refinanced," "Until Modified," "Until Assigned," "Until Delivered to Court," "After Refinancing to 1-24-48," "After Modifying to 1-24-48," and "After Assigning to 1-24-48," it seems to me that that is all necessary information and will be included in the order.

This on the lower right-hand corner which was refused——

I understand otherwise this document and form is the same?

The Witness: I believe so.

The Court: ——"Interest After Modification on Modified Principal Balance at Old Rate," "To 1-24-48," is not that the same information that you have over here?

Mr. Chapman: No, your Honor. When they changed both the principal balance and the rate of interest they have to be segregated. Some of these changes are very comprehensive. It is in essence

(Testimony of Murray B. Myerson.)

almost the rewriting of a new loan. It changes not only the interest rate but the principal balance and the monthly payments likewise change, so all the three factors, principal balance, rate of interest and monthly payment are changed in many instances and they are changed in terms that are most ambiguous.

The Court: I can appreciate the accountants' reluctance [82] to put down as an accounting matter the date of maturity of the modified maturity because from what you have stated these loans and notes are payable at a gross sum of money each month.

Mr. Chapman: That is correct.

The Court: A portion of which is principal and a portion of which is interest.

The Witness: That is correct.

The Court: If a couple of months are missed, then I suppose that that would throw out of kilter the maturity date?

The Witness: That is right.

Mr. Chapman: We only ask approximately within a few months. I think certainly in a modification from 15 to 30 years we ought to have it.

The Court: What is that?

Mr. Chapman: When there is a modification as great as from 15 to 30 years, I think they can get an approximate estimate of how much that will be. Somebody has to tell this to the borrowers. It is their payments, and it is the duty of the people that seized the institution and made those changes to

(Testimony of Murray B. Myerson.)

make that statement to the borrowers and not have us take the responsibility of doing their accounting for them. They are the ones who made the changes.

The Court: It would seem to me that this form should [83] have on it an item, "Original Maturity," "Approximate Modified Maturity"—that is the best that you can get, is it not?

The Witness: Well, that will just double the project that I mentioned before. It is difficult to ascertain the original maturity and it is difficult to arrive at the new maturity. That will double the time that will have to be devoted just to ascertaining the maturity date.

Mr. Fitting: If the court please, we have the approximate maturity on May 20th, which is already in there.

The Court: What is that?

Mr. Fitting: We have at the left-hand column at the top, "Status at May 20, 1946," and "Approximate Maturity."

The Court: Yes, that is right.

Mr. Fitting: Then on the modification we have approximate and refinancing due approximate.

The Court: Yes, that is right.

Mr. Fitting: Anything that Ammann did we have.

The Court: Yes, I think you have that.

I will not make the order to include this information requested in the lower right-hand corner at this time. If after the accounting has progressed to a point where the accountants themselves are in a position to state what they can ascertain from the

(Testimony of Murray B. Myerson.)

records, and any party to the proceedings are advised that this information should be secured, they may [84] make a motion to the court and I will give consideration to it at that time. But they now have the men available and I want them to get down there and get to work so the accounting can be completed and not spend a lot of time trying to find out what they are going to look for.

Mr. Chapman: May I understand that ruling? Then neither side is to make the calculations at this time?

The Court: You can make any calculations you want to. It is your accountants and your books and your Association now. You can make any calculations you want to.

Mr. Chapman: I appreciate that, your Honor, but I don't want us to have any liability to state to these borrowers before this accounting is approved what their loans are, what their terms of payment are, or what their interest rates are. On this ruling that you are making now that is going into the transcript, I am going to have to refer to the people when they come to me and say, "What do we owe?" I am going to have to say, "I don't know until the court rules on it. Here are the figures; make your own guess."

The Court: What do I say to people when they come to me and tell me what they really think of me?

Mr. Chapman: I do not want to be misunderstood, your Honor. I certainly wouldn't do any-

(Testimony of Murray B. Myerson.)

thing like that. I am just trying to bring you some of the difficulties that we have down there. [85]

The Court: I do not think that has anything to do with it, Mr. Chapman, at this time. I am simply trying to make this order and expedite the matter of Ammann giving an accounting to this court and to the Association, and now at my own suggestion you put your accountants in at the same time so that as you go along a great deal of time and money and effort will be saved so that at the conclusion of the accounting your accountants should be able to say, "Well, we claim that Ammann owes us so much money, for these reasons."

Mr. Chapman: That is right.

The Court: Now if you want to make those calculations, you can, but I do not want to include it in an order, and if you will attach one of these forms to the order I think that it will be a little clearer than my oral statement here in the transcript.

Mr. Chapman: We should prepare a written order. I think that is sound.

The Court: But you understand this portion that I am not ordering included?

Mr. Chapman: Perhaps I should come and look at the form. I thought I had one with me but that seems to be the only one available.

The Court: If I understand it correctly, Mr. Myerson, the matters here in the lower left-hand corner are simply matters of calculation from all this data. [86]

(Testimony of Murray B. Myerson.)

The Witness: That is what I have always thought, but I haven't gone over them enough.

The Court: This matter here on the calculating as to the modified maturity is the matter concerning which you have some doubt as to your ability to ascertain it from the records.

The Witness: I believe we can get it all right, your Honor, but I think it will take time, perhaps considerable time.

The Court: In any event, my order will be to approve this form—what do you call this, a work sheet?

The Witness: We call it a form for recording the information on the loans. We haven't gotten a nickname for it yet, but it will probably have a good one.

The Court: I see.

Mr. Chapman: And which is probably not tenable to the other side.

The Court: In any event, the order of the court will be to approve this form with this portion in the lower right-hand corner beginning "Interest After Modification on Modified Principal Balance at Old Rate" omitted but without prejudice to the rights of anybody at any time during the process of the accounting to move the court for that information to be required to be furnished.

The Witness: Yes, sir. [87]

The Court: In other words, at a later period in the accounting you may be able to ascertain that that can be found easily and quickly, or the Asso-

(Testimony of Murray B. Myerson.)

ciation's accountants may figure out some rule of thumb by which it can be ascertained.

The Witness: We have this situation now, your Honor: We have partially completed over 2000 of these on the shorter form basis. Now we have this additional information to add to the form.

The Court: I understand that that is mere calculation.

The Witness: I mean, we don't have these words and lines on the form we are working on now.

The Court: Yes.

Mr. Chapman: Your counsel were notified as to our objections before you proceeded. I think the formalities were complied with and all were put on notice.

The Court: In any event, I will make the order as I have indicated. And will you prepare a written order, and next Monday—is it agreeable to the Association and to the original stockholders and everybody else that we proceed with the FBI accountants with seven men?

Mr. Chapman: Just as soon as we can, your Honor. I want to get this accounting over with.

The Court: Is it agreeable that we proceed on that basis? [88]

Mr. Chapman: We wish that there were more, but if that is all we can get we will take them and go ahead.

The Court: Of course, you wish there were more.

Mr. Tolin, the order made here originally was to require Mr. Ammann to account. It was at the sug-

(Testimony of Murray B. Myerson.)

gestion and request of the Assistant Attorney General, Mr. MacGuineas, that the FBI accountants be designated, and my order required that they should designate accountants within a certain number of days. Now you have heard Mr. Myerson's statement that there can be seven men?

Mr. Tolin: Yes, your Honor.

The Court: I would like your assurances that there will be no effort to distract any of these men or take them away from this work until this accounting is completed.

Mr. Tolin: Your Honor, when we left court here a week ago today I communicated with Mr. Newell Clapp, who is acting for Mr. Morrison in Washington—Mr. Morrison not being immediately available then—and I also talked with Mr. Hood of the local office of the Federal Bureau of Investigation. I think all those people are in accord with the idea that the accounting shall go forward with as many men assigned to it as practicable. Mr. Hood at first didn't know that they would be able to put seven men to work, and as late as yesterday afternoon—

The Court: I understand all that. All I want to know [89] is whether or not you, as the responsible representative of the United States Government, will now assure this court that every effort will be made on your part to keep seven men at this accounting from the FBI until it is concluded.

Mr. Tolin: Certainly, your Honor.

The Court: Very well.

The Witness: May I ask a question?

The Court: Yes.

(Testimony of Murray B. Myerson.)

The Witness: There has been some mention about the plaintiff's accountants who are assisting in the accounting.

The Court: Yes.

The Witness: Of course, we have had all the assistance and cooperation from Mr. Smith that we have asked for. Of course, Mr. Smith is there largely in an advisory capacity. There is no work being done on this project so far as I know by any of the plaintiff's accountants.

The Court: I understand.

The Witness: You understand that?

The Court: Yes.

The Witness: That is okay.

The Court: Yes, I understand that.

In other words, the idea of having Mr. Smith there is so that when your accountants come in that I will not have to wait another six months while the Association goes back and checks your [90] accountants.

The Witness: The idea being that Mr. Smith would check our accounting as we go along?

The Court: Mr. Smith should verify this information sheet by sheet so that when it is finished the Association and Ammann will be able to tell this court, "This is what the books show."

You understand that?

Mr. Smith: Yes, your Honor.

The Court: Are you doing that?

The Witness: We haven't presented a completed sheet to Mr. Smith as yet. We are just picking up

(Testimony of Murray B. Myerson.)

information as we can from the various records that we have. We have to gather in some cases—well, we have to gather information from four or five different sources before we can complete a single sheet and before computations are made. So I don't know at what stage of the game the plaintiffs will have an opportunity to start checking our sheets.

The Court: I understand.

Mr. Chapman: We have yet to have the first of that work submitted to us to check.

The Court: What is that?

Mr. Chapman: We have yet to have the first of Mr. Myerson's work submitted to us to check, and any figures or computations. We have had discussions as to forms but, as he just now says, he has yet to give us the first of these [91] completed sheets on which we can make computations or check his calculations.

The Court: Can the Association's accountants have sufficient men available so that it will not delay the work of the other accountants?

Mr. Chapman: As soon as there is any work for them to do, we will have the men available. As soon as there is anything delivered to us to work on, we will.

The Court: Would that be a practical matter, to turn these over to them?

The Witness: Yes, indeed.

The Court: As you go along?

The Witness: Yes, sir. As soon as we get any

(Testimony of Murray B. Myerson.)

quantity of completed work done we can turn them over to them and they can work out their method of checking our figures.

The Court: Very well. If there is any difficulty in connection with the matter, why any party can come to court or go to the special master.

Mr. Chapman: We will prepare an order and submit it, your Honor.

The Court: Very well. Is there anything else?

Mr. Westover: Just one point, so that there won't be any confusion about it. As I understand it, Mr. Smith and his accountants can check the transfer from the books to the various sheets. In other words—— [92]

The Court: I think the accountants can work that out among themselves. Do you not feel so, Mr. Smith?

Mr. Smith: I feel confident that we can, sir.

The Court: In other words, I do not want you to come back here at the end of this accounting and then have the Association's accountants say, "Well, we have not got an accounting and we have to go down and check all of these figures against all the original records from which they are taken."

Mr. Westover: They can check them against the original records, but there should be some period of computing after we get the computations of what Ammann's figures show.

The Court: Let them figure it out. If they can figure it out among themselves, fine; if they cannot,

(Testimony of Murray B. Myerson.)

you can come up here and I will do something about it.

Mr. Chapman: I think what your Honor contemplates is an assembly line so that as soon as we get the first part on our end of the line we can go to work on them.

The Court: Very well. And you might recite in the order that the assurances are given to the court that there will be five men Monday and shortly thereafter seven men, seven accountants, to be maintained on the job until it is finished.

Mr. Chapman: As soon as we can have this transcript we will prepare the order, your [93] Honor.

I would also like to have the record show that there is a matter set next Monday, and I had previously a matter set in Long Beach which I had expressly said that that Monday was clear, two weeks ago. I am making every effort to continue it, but there is a possibility that I can't be here next Monday.

The Court: What is on for next Monday?

Mr. Chapman: Mr. Walker has a motion on I think for additional fees. I want to be present when that is argued. I will let the court and Mr. Walker know before the close of this week if I can continue my Long Beach matter, and if I cannot I may have to ask the court's indulgence here.

The Court: We will meet that bridge when we come to it.

Now the matter formally on the calendar today

(Testimony of Murray B. Myerson.)
was the interim report of the special master.

Mr. Walker: Yes, your Honor.

The Court: That will just go off calendar.

Mr. Walker: Thank you.

The Court: Very well. We will have a short recess and then take up the other criminal matters.

(Whereupon, at 10:40 o'clock a.m., a recess was taken.)

[Endorsed]: Filed March 26, 1951. [94]

REPORTER'S TRANSCRIPT
OF PROCEEDINGS

November 6, 1950—10:00 A.M.

(Other court matters.)

The Clerk: No. 5421-PH, Civil, Mallonee v. Fahey, consolidated with No. 5678.

The Court: We will have a short recess before I take up this matter.

Mr. Chapman: May I suggest before you recess, I was served with 20 pages of opposition at 10:15 this morning. During the court's proceedings I managed to go through about 10 of these pages, but I would like an opportunity to know something about what the opposition is about.

The Court: Has everybody served everything on everybody else that they are going to serve in this matter?

Mr. Bishop: Your Honor, could I approach the bench to have a stipulation filed? We were unable to get you on Friday afternoon to sign it, but Mr.

Walker stipulated that we could have until today within which to file our opposition, and I do want to extend every opportunity to Mr. Chapman for further examination of our opposition. However, I would like to say that the opposition is exactly the same in all respects as it was the last time, substantially, and in that connection I, of course, have at no time assumed any responsibility in this matter in connection with the opposition of Mr. Walker's matter because of the association that has existed [4*] between us.

However, the papers were served on me and I want to explain why there has been a little delay. There wasn't five days for my opposing counsel, Mr. Angell, to even have a chance to prepare any papers because I have to send them up north and the time got very short. But as far as the time of the court is concerned, I think I can safely say that it is exactly the same position as we took the last time.

Is that correct, Mr. Angell?

Mr. Angell: That is correct. They are jurisdictional.

The Court: I would like to observe in that connection, the reason for the appointment of the special master in connection with the discovery proceedings was, No. 1, because I think that the parties seeking discovery are entitled to it in connection with the whole case, and particularly are they entitled to it in connection with the deposition of Mr. Fahey, and the reason for the appointment of a

* Page numbering appearing at top of page of original Reporter's Transcript.

special master was to protect and preserve the rights of the Bank and of the public. So far as the parties seeking discovery are concerned, I do not need any special master. I can order a discovery and order the Bank to let them go down and see everything, and hold the Bank in contempt if you refuse.

So it seems to me that the Bank has very little footing to stand on in coming in here and objecting to a special master who was made necessary by their objections to the discovery. [5]

Mr. Bishop: May I reply to that, your Honor?

The Court: Yes.

Mr. Bishop: I believe you said in connection with another matter you heard this morning that there was virtue in persistence. We have raised—and I don't propose to reargue them this morning; and I do not think Mr. Angell does—certain jurisdictional questions which, as I say, have been raised *ad infinitum* and *ad nauseam* until the court doesn't want to hear any more. We are merely preserving our record, and I believe that we would be criticized if we didn't do so, and it would be our duty and privilege as lawyers to continue to do so. That was why I was trying to make the issue very clear. Furthermore, the special master is not only special master for the discovery proceedings, he is also special master in the accounting proceedings.

The Court: Yes, he is special master in the accounting proceedings as well, but insofar as the work which the special master has been doing on the last two or three allowances, whatever they

were, it has been principally in connection with the discovery proceedings.

Mr. Bishop: That is correct, your Honor.

The Court: And as to the discovery proceedings, as I say, the special master is made necessary only by virtue of the defendants' objections and the court's desire to preserve [6] the objections of the defendants in connection with the public interest which was urged upon the court as being involved.

Now, if the defendant bank and the official defendants object to having the special master, I have held that the plaintiffs are entitled to their inspection, and if there is any further objection to it I will discharge the special master and compel the defendants to permit inspection of all documents at the place of business, whenever they want to. This inspection proceeding has dragged out so long that it is getting to be ridiculous.

I think we will have the morning recess. Before we recess, however, here is a thought that I have in mind in connection with this matter. I have some other matters coming up this morning—how long will you be, Mr. Grainger?

Mr. Grainger: I think that it will probably take us a full hour.

The Court: Then I have the criminal calendar this afternoon, a criminal sentence calendar, and also two pre-trials. I think probably time might be saved in connection with the Long Beach matter if I just continued this hearing until 3:00 o'clock this afternoon. Then everybody would be able to read the affidavits.

Here is a thought in connection with this matter that I would like to put out to counsel and the master, that probably this matter could best be handled in view of the fact [7] that it is almost a continuous job by the master, of a monthly allowance of fees and payable monthly. I would like counsel to think about that in the meantime.

We will have a short recess, and this matter will be continued until 3:00 o'clock this afternoon.

(Other court matters.) [8]

November 11, 1950—3:00 o'Clock, P.M.

(Other court matters.)

The Court: Very well. Mallonee vs. Fahey. Hearing on motion for approval of interim report of special master and for allowance of interim fees. I have read the master's answering affidavit.

Mr. Walker?

Mr. Walker: I do not know that any prolonged argument on the petition is required, your Honor. I have attempted in my petition this time to set forth the days and hours. The whole thing is reduced to days. I believe my petition shows 76½ days, and since that time, since the time of the filing of the petition, to date there have been two additional discovery proceedings and a half day in court the other day on the accounting matter, which would make a total of 79 days' work involved, of which 63 have been in connection with the discovery hearings, that is, actual hearings.

I was naturally somewhat hesitant in filing for another interim allowance, due to the fact that an appeal had been taken from the last order. However, since this case is engaging a great deal of my time, if I am to continue in this work my appetite prompts me to file again for fees. In other words, to keep the wolf from the door.

The Court: If I understand what you are saying, and [9] not quite as bluntly, it is that you are now in the position where you either must discontinue being special master or get some more fees.

Mr. Walker: That is right, your Honor, it having been eight months since the last allowance.

The objections filed on behalf of the San Francisco Bank, it seems to me, go more to the propriety of assessing the fees at the conclusion of the case rather than to the interim allowance at this time.

The Court: I think that is correct. It is not now a question of assessing fees—as a matter of fact, I would like to add to the observations that I made this morning—that the necessity for the special master arose not only from the objections urged by the defendant bank and the official defendants that there was confidential information, but also from their objections that to permit the inspection would interfere with the conduct of their business. So the court is certainly not now, and has not intended at any time to indicate against whom these fees would ultimately be charged, and I do not propose now to make any decision on that point.

Mr. Walker: That probably covers the point that I was going to make.

In the objections there is some reference made to the extended time which has been required in the discovery proceedings and, frankly, it seems to me it has continued for a [10] long, long time.

The Court: In connection with the discovery and Mr. Newell's segregation of matters out of the supervisory files, are those submitted to you before he withdraws them?

Mr. Walker: No, they have not been submitted to me.

The Court: They should be.

Mr. Walker: The culling or the segregation of the files has all been completed in the Los Angeles office, your Honor. They have not come in to the discovery proceedings as yet. I understand they are ready to come in, that is, when we reach that point.

The Court: I think the master is the one who should say whether or not they are of a confidential nature or would injure the public interest rather than the Bank or some officer or some official or bookkeeper, clerk or auditor of the Bank.

Mr. Walker: Well, your Honor will recall that that was done by arrangement and agreement with the Department of Justice at the time the executive privilege was urged against the production of those records, so that a representative from the Home Loan Bank Board was appointed to segregate the material in those files by data and as in the public interest.

The Court: That is right, but sooner or later some member of the judicial branch of the Government is going to [11] have to pass on whether or not

he made a right segregation. Something may appear to him to affect the public interest because it might affect the outcome of this lawsuit, as far as the Bank is concerned, or some of the defendants.

Mr. Walker: It will ultimately require a ruling on the executive privilege, which has been asserted against the material which has been removed from the file.

The Court: But the discovery has not yet reached that point?

Mr. Walker: We are just about there, your Honor.

The Court: Very well.

Do you have anything more to say?

Mr. Walker: I suppose I should go into the question of the value of fees, your Honor, and the amount which I would like to request.

We have had expert testimony by several attorneys as to the value of attorney fees. I think an attorney in the capacity of master is probably entitled to the same working rate, although it is in a different capacity, nevertheless the headaches are not less severe. The testimony, I believe of almost all of the three or four different experts, has placed a value of an attorney's services to do justice to himself at around \$250 a day. I think that is rather high for the services which I have rendered in this case, and I am not asking for that amount, but I refer to it as the only [12] evidence before the court.

An element has entered into this matter, however, which I believe should be referred to, and that is the question of contingency. In other words, there are

appeals, or there is one appeal pending from the previous allowance, and if the Government and the San Francisco Bank are going to be consistent I can only assume that there will be an additional appeal from this.

I made various computations here on different rates per day, your Honor, and if you are interested in them I will give them to you.

It would seem to me that with the ramifications and complications and complexities of this case, a figure of \$200 a day is not excessive. Based on that figure, for the 79 days involved the figure is \$15,800.

The Court: Seventy-six and one-half days, is it not?

Mr. Walker: There is $2\frac{1}{2}$ days between the filing of the petition and the present hearing.

The Court: Let us not count those yet.

Mr. Walker: That throws my figures off then. I made it on the basis of 79 days.

The Court: Well, on the basis of 79 days, at what rate?

Mr. Walker: At \$200 a day, that is \$15,800.

I also made a computation on the basis of \$200 for the [13] discovery hearings and \$150 for the office and court days. There were 16 such days and 63 days of discovery hearings. That totals \$14,800.

I made another computation on the basis of \$150 for 79 days straight through, and that figure is \$11,850.

I made another computation on the basis of \$100 for 79 days, which, of course, is \$7900.

I feel that the latter figure is too low. I feel that the figure of \$200 a day for the discovery proceedings and \$150 a day for the office and court work, or an amount of \$14,800, is not excessive.

Of course I will be only too happy to accept whatever figure the court may allow me.

The Court: Did you keep any records of the hours involved in the formal hearings? How long do they last, how many hours?

Mr. Walker: We convene at 10:00 a.m., we usually take a 2-hour recess, although that is not universal; sometimes we reconvene at 1:30. The bank vault closes at 4:30, so we try to conclude by 4:15 to 4:30 so that the books and records may be put into the vault. It is about a 4½-hour court day.

The Court: But it actually kills the whole day?

Mr. Walker: It kills the whole day completely; yes.

On the other days for the office work, which is a bit involved, I totaled the hours and divided that by 7 so that [14] that computation is made on the basis of a 7-hour day for that work.

I have the transcripts here of the discovery proceedings. I do not know whether the court or any of the counsel are interested in seeing them. But we have not been idle. There are 71 transcripts here. The total pages are 2291. The volumes themselves are misleading in that the thick ones containing a lot of pages is a lot of argument and not much discovery, whereas the very thin ones we can say that the time was spent in the examination of the files and records.

The Court: Very well.

Do you have anything to say other than your formal objections lodged in your affidavit in response, Mr. Fitting?

Mr. Fitting: Our objections appear in the response that we have filed, your Honor. They are the same objections that we have heretofore presented.

The Court: Very well.

Mr. Angell: We have nothing new to add as to what we argued at the last hearing, and our objections are substantially the same.

The Court: Assuming you are wrong, how much should be allowed him per day?

Mr. Angell: I wouldn't want to say, your Honor.

The Court: Mr. Bishop?

Mr. Bishop: For reasons previously stated, your Honor, [15] and that is the association between Mr. Walker and myself, I don't think I should make any suggestion, as people might say I was prejudiced or biased in his favor.

I do want to make this one observation, your Honor—it doesn't directly have to do with that question, but I didn't want your Honor to misunderstand the situation about the so-called supervisory records. You referred to the Bank. That is a problem between the Home Loan Bank Board and the opposition, not the Bank. In other words, the culling of the supervisory files, that arrangement, was not made by——

The Court: We will come to that later. Maybe I had a misunderstanding.

Mr. Chapman: Your Honor, Mr. Noon has filed

an affidavit and we have him here under subpoena. I would like to ask him a few questions about this.

The Court: Very well. Come forward and be sworn.

I do not think that the matters in Mr. Noon's affidavit about how much interest has accumulated and the amount on deposit, and in the answer filed here, are material because I am not now, and have not at any time done so, or intended to indicate against whom or by whom these fees should ultimately be paid.

Mr. Chapman: I think your Honor is undoubtedly correct, but we have the problem that that affidavit was probably filed as the basis of part of the appeal. I don't think it [16] is correct as stated and I wanted to inquire into it so if anything is done in the appellate court they will have the benefit of the cross-examination.

Mr. Angell: The only purpose of that affidavit is to show that the notes remain unpaid, and at this time, and the lien of the bank.

The Court: I would strike the affidavit as immaterial, wholly immaterial, in connection with this hearing.

Mr. Angell: To which we would like, for the record, to have our objection noted.

The Court: I mean, if anybody would make a motion to that effect.

Mr. Chapman: I haven't so moved because I would still like to cross-examine Mr. Noon on the subject. I believe you would be correct in so striking it. However, it is in the file whether you strike

it or not, and it still goes up on appeal, and it isn't consistent with his last affidavit. I would like to see where the difference is, your Honor. He filed the same kind of an affidavit in March, on the same subject matter. I would like to go into it. I think I can be very brief about it.

Mr. Angell: We have no objection. We want the right figures in there, too, and if there is any discrepancy we would like to have it.

Mr. Bishop: I would like to make an observation about [17] that affidavit. There is another point where we believe that it is important, and that is by the mere fact that the court has not attempted in some of its previous orders to assess the cost of the master, or to assess attorney fees in one instance against a particular party but in others it has, but nonetheless the fund that is in court is being invaded, and that is to show that we have an interest in that fund. Otherwise I don't think we would even have any right to appeal. We have to make some showing that it is our fund, and for no other purpose than that I believe the affidavit is a guide and of service to the court in illustrating that we at least have some interest in moneys of ours that are on deposit in court.

Mr. Chapman: If it is going to remain in the record, I want to cross-examine him on it, your Honor.

The Court: No one has moved to strike it.

Be sworn, Mr. Noon.

FRANK C. NOON

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

The Clerk: Give your full name.

The Witness: Frank C. Noon.

The Clerk: And your address.

The Witness: 5541 Carlton Way. [18]

The Clerk: Los Angeles?

The Witness: Los Angeles.

Mr. Chapman: May I have the file that has the affidavit, your Honor?

(The file referred to was passed to counsel.)

Direct Examination

By Mr. Chapman:

Q. Mr. Noon, I am showing you the original of an affidavit filed November 6, 1950, marked "Affidavit of Frank C. Noon." It seems to bear your signature and was apparently sworn to before a notary.

On page 2 of the affidavit at line 12 and line 13 I notice some corrections, Mr. Noon. The sentence before it was corrected read, "That there is accumulated and unpaid interest on the United States Government bonds hereinafter mentioned in the sum of \$277,851.23," and I notice the word "is" is stricken out and "was" is written above it, and that there is an insertion in handwriting "on February 26, 1950."

(Testimony of Frank C. Noon.)

Can you tell me whose handwriting that insertion is in? A. Yes.

Q. Whose is it?

A. Mrs. Knowlan, Louella Knowlan, who is a bookkeeper in the Bank.

Q. Can you tell us at whose suggestion that change was made in the affidavit? [19]

A. Mine.

Q. Was that before or after you swore to it?

A. Before.

Q. Why was the change suggested, Mr. Noon?

A. Because I did not have the figures as of this date and couldn't get them until hours afterwards.

Q. When you refer to "this date," what date do you mean? A. The date of November 6th.

The Court: How much interest has accumulated now on the bonds?

The Witness: I can't give it to this date now. I have the figure.

The Court: This is November 6th.

The Witness: Yes. I can't give you that figure. I have secured from the Federal Reserve the amount of coupon accumulation to September 30, but I haven't accrued it from that point on.

The Court: How much is it to September 30th?

The Witness (Examining document): I was wrong as to the date. Those coupons are collectible on the 15th of June, and this is to June 15, 1950—\$314.875. I obtained that by telephone from the Federal Reserve Bank.

The Court: Let me see the affidavit.

(Testimony of Frank C. Noon.)

(The document referred to was passed to the court.) [20]

The Court: So that between February 26, 1950, and June 30, there was accumulated the difference between \$277,851.23 and the figure you just mentioned, which was what?

The Witness: \$314,875.

The Court: Or a difference of \$37,024 approximately.

The Witness: Right.

Mr. Angell: And it is accumulating at the same rate, is it not, Mr. Noon?

The Witness: That is correct.

The Court: It is accumulating at about the rate of \$10,000 a month then?

The Witness: That is right.

The Court: So the money that was owing on the interest was \$359,013 on the 6th of November, and the money accumulated on the bonds was \$314,875, so that there is a difference between the two of about \$45,000.

The Witness: Yes. It would of course be more because this is the 6th of November, and this is from June 30th to November 6th.

The Court: This is the 6th of November. It says the 6th of November.

The Witness: But the accrued interest on the bonds is to June 15th.

The Court: I know, but the accrued interest to this date on the note is \$315,000. [21]

(Testimony of Frank C. Noon.)

The Witness: Yes. I misunderstood you.

The Court: And the accrued interest on the bonds then would be—that is June 15, you say?

The Witness: June 15; yes. (Making calculation.) Something over \$40,000.

The Court: Or there would be approximately \$360,000 as of today accumulated as interest on the bonds as against \$359,000 on the note?

The Witness: That is about right.

The Court: They about offset each other then?

The Witness: That is right.

The Court: Was that not the way we figured it when the deposit started, that it would be about that?

The Witness: Yes.

Mr. Chapman: That isn't the way the affidavit shows. I want a little more time to cross-examine on the affidavit.

The Court: Very well.

Q. (By Mr. Chapman): Mr. Noon, I am pointing now to line 4 of the affidavit of November 6th. There is a blank there in the typing and a figure filled in in pen and ink of \$359,013.70. Are those figures in your handwriting? A. No.

Q. Can you tell us whose handwriting they are?

A. Yes, the same person; Mrs. Knowlan. [22]

Q. Did you actually make that computation yourself, Mr. Noon?

A. Not then, but I have since. That is, I have checked the method. I haven't gone through every detail of the computation.

(Testimony of Frank C. Noon.)

Q. Have you checked any of the calculations in your affidavit, Mr. Noon, yourself? A. Yes.

Q. Which ones?

A. I got this figure of the interest due.

Q. Will you give me the line you are pointing to? A. On line 14.

Q. Would you read the amount?

A. \$277,851.23. That was taken from the former affidavit which I think was in February, and at that time I got that figure from the Federal Reserve.

Q. That is your own former affidavit that you are referring to, is that right?

A. That is right.

Mr. Angell: That was in March.

The Witness: March, I should say.

The total figure of interest and principal on line 11 I have checked by taking this figure, the figure of accrued interest on line 14, adding it to \$6,300,000 and subtracting from it \$6084. [23]

Q. (By Mr. Chapman): In other words, you used a different figure and a different time period for calculating the interest on the notes and the interest on the bonds, is that right?

A. That is correct.

The Court: The long and short of it then is that if your affidavit were brought down to date on both the note and the other bonds, it would be that they are substantially equivalent in interest?

The Witness: That is correct.

(Testimony of Frank C. Noon.)

The Court: And that the security position has not changed since the deposit was made?

The Witness: That is right.

Mr. Bishop: That is so far as the paper record is concerned. That doesn't mean the funds in court, is that correct?

Mr. Chapman: Who is testifying here?

The Court: He is testifying.

Mr. Bishop: I am just asking so that I understand the court, Mr. Chapman.

The Court: I understood his answer.

Mr. Bishop: I wanted to understand you, your Honor.

The Court: I understood my question.

The Witness: I am wondering if I gave the right answer, because when I deposited the securities in court there were [24] a lot of mortgages too which are not there now, I understand.

The Court: Then the security position is not changed in so far as the note and these bonds are concerned and the money since the time that my order was made releasing the trust deeds?

The Witness: To the best of my knowledge, that is correct.

The Court: It is substantially the same now as then regardless of the date you calculate interest to, et cetera?

The Witness: That is correct.

Q. (By Mr. Chapman): Mr. Noon, your former affidavit is dated February 28, 1950. I have here a copy that was served on us by counsel and has been

(Testimony of Frank C. Noon.)

pretty well scribbled up with memos, and so forth, which fortunately are in another color, red.

This, I think, you can recognize from the type-writing, Mr. Bishop. (Exhibiting document to counsel.)

Mr. Bishop: I want you to get the original if you can, or a copy of it.

The Court: Very well. We will just issue an order to the Chief Judge of the Circuit Court of Appeals and tell him to send the original down here right now.

Mr. Bishop: Your Honor, I understand they have photostatic copies over there. I would like to have a photostatic [25] copy.

The Court: You said you wanted the original. You have an appeal up there pending, so you can go up and get the record.

Mr. Angell: What is this?

Mr. Chapman: I would have thought that I could depend on the copy that was served on me.

Mr. Angell: I have a copy here of the former affidavit.

Mr. Chapman: I would be glad to use yours. This is the one that was served on Mr. Westover.

Mr. Angell: What is it, Mr. Chapman?

Mr. Chapman: It is the one that was served on us. It is the only one we had to work on.

Mr. Bishop: I think the witness is entitled to be confronted with the one he has signed.

Mr. Angell: This is the affidavit he made on February 28, 1950.

(Testimony of Frank C. Noon.)

Mr. Bishop: That is a copy.

The Court: That is a copy of it, and that is the copy that was served, and that is the copy that counsel was entitled to rely on as the witness having signed. And if counsel served it, he represented to counsel when he served it that that is the one that was signed, and I think the witness can rely on the counsel who prepared the affidavit.

Mr. Bishop: I would like to say, your Honor, that I do [26] not believe that the witness is right and I don't know whether there is anything incorrect or correct about either situation, but he is entitled to be confronted at least with the photostatic copy of his affidavit, because the same thing happened last time, there was some changing around of the figures, and I would like the record to show—go right ahead, Mr. Chapman. We will wait until you have had your fun.

Mr. Westover: Just a moment. Since that was the copy that was served on my office, I want to say that there wasn't any changing around of figures, and there isn't any now. There are some red notations which are my personal notations, but there was no changing of any figures by our office.

Mr. Bishop: May I finish?

The Court: Is this the way the discovery proceedings go, Mr. Walker?

Mr. Walker: Your Honor, I was going to wait until all counsel had completed and then I was going to add just one more word—you see?

(Testimony of Frank C. Noon.)

The Court: Mr. Bishop, do you have any doubt about Mr. Chapman's statement that that is a copy of the affidavit served on him?

Mr. Bishop: I haven't any doubt about his statement, but I don't see why it hurts to see the original affidavit, because there have been changes on the affidavit. [27]

The Court: The original affidavit you will have to go to San Francisco for, to the Circuit Court of Appeals.

Mr. Bishop: I understand there is a photostatic copy of it here.

The Court: Not in the possession of this court.

Mr. Bishop: There is one more clarification here, if I might make it right now, and I want to do it in all fairness to Mr. Noon——

Mr. Chapman: I wonder if I can cross-examine this witness, your Honor?

Mr. Bishop: I am asking a voir dire question.

Mr. Chapman: Let me have a little cross-examination just for a change, will you?

The Court: You want to ask a voir dire question?

Mr. Bishop: Yes.

The Court: About what? He left the question unanswered about the affidavit and the preparation.

Mr. Bishop: I think I have a right to show the facts.

The Court: He left a question unanswered. He has not asked a question. He merely asked you

(Testimony of Frank C. Noon.)

whether or not you had an objection to the use of that copy. I am willing as a judge to accept counsel's statement that that was the affidavit that was served upon him. Let us proceed.

Mr. Bishop: I have no objection if it is understood that he is not being confronted with the original. [28]

Q. (By Mr. Chapman): Mr. Noon, will you read the document I am now showing you, which is a carbon copy, unsigned—it is not a signed original—of your former affidavit, and then I will ask you to ignore the matter that appears on there in red, which are Mr. Westover's notes on that copy of the affidavit.

A. (Examining document.)

Q. Now, Mr. Noon, I am directing your attention to page 2 of the copy of your affidavit of February 28, 1950, and line 1 on page 2 contains some figures. The sentence starts back on page 1, "That there is interest accrued and accruing and unpaid on said notes at the rate of 2 per cent per annum in the amount of \$269,325.12 as of this 28th day of February, after crediting the sum of \$3042"—apparently a dividend of some sort—and the affidavit then goes on, lines 9 to 11 on page 2, "That there is accumulated an unpaid interest on United States Government bonds hereinafter mentioned in the sum of \$277,851.23." Apparently from your affidavit in February there was a difference in favor of the Government bonds above the interest on the note of some \$7000 or \$8000. Now that affidavit was

(Testimony of Frank C. Noon.)

correct at that time in February, 1950, was it not?

A. As far as I can tell, that was correct.

Q. Did you make any other computations on your February affidavit? [29]

A. No, I checked them again to make sure that the method was right, but I did not make the calculations personally.

Q. Do you know whether or not there is any difference now between the unpaid balance claimed to be due on the interest on the notes and the accrued interest on the Government bonds as of today?

A. I do not.

The Court: Mr. Noon, in February there was a balance of accrued interest in favor of the bonds, the interest on the bonds?

The Witness: That is correct.

The Court: The bonds have continued to earn interest at the same rate, and the note has continued to accumulate interest at the same rate?

The Witness: Yes.

The Court: So if that balance existed then it exists now, does it not?

The Witness: I couldn't say with certainty, because you have \$5,300,000 of bonds and \$6,300,000 of indebtedness, and the differential there will change. It will get less as time runs on.

The Court: What will change?

The Witness: The amount that the interest on the bonds exceeds the amount on the loan will change. It won't be the [30] same differential all the time.

(Testimony of Frank C. Noon.)

The Court: Do not the bonds bear the rate of interest stated on them now that they did in February?

The Witness: Yes. The only way I could tell just what the figure is, is to have that calculated, which is quite a job.

Q. (By Mr. Chapman): Mr. Noon, do you know what the daily rate is of the bonds that are in court? A. No.

Q. Of your own knowledge? A. No.

Q. Do you know what the daily rate of interest is on the 2 per cent, or claimed to be due on these notes? A. No, I don't remember.

The Court: Have you calculated them, Mr. Chapman?

Mr. Chapman: We have made some calculations, your Honor, but because we didn't execute the documents—it is Ammann's signature to the San Francisco Bank—we didn't want to take responsibility for the calculations.

Our figures show, and these aren't my personal figures——

The Court: These are the figures taken from Ammann's report?

Mr. Chapman: No, they don't show that in the accounting. But simple arithmetic from what we know of the Government [31] bonds indicates a daily interest rate for the bonds of \$345.06 per day, \$10,495.83 per month, \$125,950 per year.

On the notes at 2 per cent, the claimed interest rate on the balance that they claim to be due—of

(Testimony of Frank C. Noon.)

course we dispute all that—the figures would show \$345.20 per day——

The Court: What is the bonds?

Mr. Chapman: \$345.06. The other is \$345.20, or 14 cents a day difference.

The Court: That is accumulating on the note?

Mr. Chapman: Fourteen cents a day more on the note, or \$4.17 a month——

The Court: Just a moment. Fourteen cents a day more accumulating on the note than accumulates on the bonds?

Mr. Chapman: That is correct.

The Court: I see.

Mr. Chapman: And the figures for the month are, for the note——

The Court: It would be the same thing multiplied.

Mr. Chapman: Yes.

Q. Now, Mr. Noon, you don't know any of those figures of your own knowledge, do you?

A. No.

Mr. Chapman: Now, your Honor, I am willing to make the motion to strike this affidavit on the basis that the witness hasn't made any of the calculations, that the affidavit is [32] misleading to the court and doesn't show the true condition as shown from the files and records. I think those matters, if they want to bring them before the court, are matters of judicial notice. The bonds are in the registry of the court. The notes have been impounded by your Honor. So I move to strike

(Testimony of Frank C. Noon.)

this affidavit on the grounds stated.

The Court: I think it is a matter of judicial notice. I can take judicial notice of the fact that the bonds are there, that they bear so much interest, and it is merely a matter of mathematical calculation. And, besides, I think it is immaterial.

Mr. Chapman: I would like to make my motion on the ground that it is inaccurate and the witness doesn't know what is in his affidavit, and move to strike it on that ground.

Mr. Angell: It isn't true because the interest on the note is not paid and I think it should be of interest to counsel to know how much was still due on these dates. Naturally these figures change every single day.

The Court: By 14 cents.

Mr. Angell: I beg your pardon?

The Court: By 14 cents.

Mr. Angell: Well, by 14 cents. But the amounts change as to the amount of interest due on the bonds, the amount of interest due on the notes, not by 14 cents. That is merely [33] the differential between the two. The differentials keep changing also, and every bit of this is a matter of just out and out computation mathematically, and naturally if there were any of those figures wrong the fact that Mr. Noon had made an error in his affidavit——

The Court: I think it is immaterial what the amount was on the note on November 6th and the amount of interest on the bonds on February 26.

(Testimony of Frank C. Noon.)

Mr. Angell: We ask that the affidavit remain in to establish this fact, and that is, that the notes have not been paid.

The Court: The court can take judicial notice of its files and records.

Mr. Angell: You can't take judicial notice of the fact that the notes haven't been paid.

The Court: They are still here.

Mr. Chapman: We are disputing that statement.

The Court: I can take notice of whatever condition they were in when they were deposited.

Mr. Angell: If it is stipulated that the notes have not been paid and the interest there was to whatever notes they are, we have no objection to striking the affidavit.

Mr. Chapman: I am not making any such stipulation.

Mr. Westover: We refuse to stipulate to that.

Mr. Angell: Then let the affidavit remain in to establish [34] that fact.

Mr. Chapman: I have a motion to strike the affidavit on the ground that it is inaccurate and misleading, and I think we have demonstrated by cross-examination that the witness doesn't know.

Mr. Angell: I would like to ask the witness a few questions.

Mr. Chapman: I would like to finish my motion.

And, further, that it does not truly reflect the situation from the calculations. Now I don't claim

(Testimony of Frank C. Noon.)

any particular accuracy for these calculations, they were done in a hurry——

Mr. Angell: The figures are absolutely accurate as far as they go. All you have done is turned them around and say they don't go to today.

The Court: The motion is denied on that ground, but it is granted upon the court's own motion on the ground that it is immaterial, the dates that are set forth in there, and the affidavit is stricken.

Mr. Bishop: Your Honor, could I, out of fairness to the witness, ask him one question? They claim that this is inaccurate and not properly prepared, and the implication was left that this has been altered.

The Court: Very well.

Q. (By Mr. Bishop): Mr. Noon, each and every one of these figures that [35] have been filled in with pen and ink, did I understand you to say that they were filled in by your direction?

A. They were.

Q. You told Mrs. Knowlan to do that?

A. I did.

Q. And that was done before you executed this affidavit? A. They were.

Q. And that was done at your insistence?

A. Yes.

Q. And did you call the Federal Reserve Bank this morning sometime between 9:30 and 10:00 o'clock to get the most recent figure?

Mr. Chapman: Just a moment. I don't like to make objections, but I think——

The Court: That has been asked and answered.

(Testimony of Frank C. Noon.)

He said it was all done at his direction. I do not think that the witness appears in any unfair light before the court at all.

Mr. Bishop: All right. I am content on that.

Mr. Chapman: That is all as far as Mr. Noon is concerned.

The Court: Step down.

(Witness excused.)

The Court: Now do you have anything else to present?

Mr. Chapman: I would like to present some evidence, [36] your Honor.

The Court: Do you have any ideas about what should be allowed the special master here, the rate per day or what?

Mr. Chapman: I would like the record to show that the examination I conducted of Mr. Noon was under Rule 43(b), adverse cross-examination of an officer of the San Francisco Bank.

The Court: Very well.

Mr. Westover: And he is also an officer of the Federal Savings & Loan Insurance Corporation, or their agent, rather.

The Court: He is also supervisory agent for the Board, are you not, or something like that?

Mr. Noon: Yes.

The Court: Home Loan Bank Board?

Mr. Noon: Yes.

The Court: Very well. His examination was under 43(b).

Mr. Chapman: Your Honor has asked for sug-

gestions as to rates. I realize that it would be most helpful to the court, but I think it is most difficult for counsel to do so because we are appearing before the special master.

I do think, though, whatever the eventual rate should be, that this is too early to fix it. As I understand the allowances that were previously made were every one an interim allowance upon account.

The Court: That is right. [37]

Mr. Chapman: I didn't think that any finality as to the total amount or the total rate had gone into any of the previous allowances. I don't think it is contemplated, as I read the petition, that there shall be anything final in this allowance.

I do think that in the succession of appeals that we have seen within the last few months, there is an obvious attempt to frustrate the power of this court to proceed with the case, even to the point of denying the special master compensation with which to proceed.

It seems to me——

Mr. Angell: If your Honor please, I resent that statement. By protecting the rights of our client in an appeal, whenever counsel for the Bank or the Government take those appeals, we are not frustrating this court or frustrating justice, and I resent the charge made by counsel.

Mr. Chapman: Since you are resenting, I would like to continue my argument.

Mr. Angell: If we don't appeal we waive our rights, and if we appeal we frustrate the jurisdic-

tion of this court to proceed. I resent statements of that kind by counsel.

Mr. Chapman: Mr. Angell, you are going to have a lot more to resent. I am going to ask you to hold up until the end of my argument. Apparently I can't make an argument without getting some resentment. I would just like not to be [38] interrupted quite so much. I think he can accumulate the resentment until the end of the argument and present it all at once.

The Court: Maybe if everybody would quit baiting everybody else quite as much there would not be as much resentment, or as much time wasted.

Mr. Chapman: At any rate, your Honor, it seems to me that the special master is going to be confronted with some more appeals from whatever allowance he gets. He hasn't gotten down to the level of counsel, where we had to take a third to get by on and get some money to go on with the litigation.

I think the suggestion as made from the bench this morning about monthly payments would be most appropriate. It seems to me in other cases that have run, not anywhere as near as long as this one has, where there have been receivers and special masters and other officials of the court, where there couldn't be any question but what they had to be paid or the judicial process could not be carried out, that there have been orders making a monthly allowance or weekly allowance or semi-annual allowance or some periodic allowance on account. There was no effort in those to fix the

total amount of compensation, nor to then fix the total reasonable value. They were purely an interim allowance on account, and in case an appeal were taken from that kind of an order, and in case [39] it was affirmed, the judicial process through the special master would at least be assured until the end of this litigation, whenever that might be.

The result is now in successive appeals and successive allowances that the special master no sooner gets one allowance and fights his appeal through on that than another one is necessary to keep him going. You will probably have a situation where the successive piled-up appeals will be such that he will have a backlog of allowances that some day he hopes to collect or some day he wonders whether he is going to keep the money after he has spent it for living expenses in order to be special master.

I don't know what to suggest as to the amount. I think it is safe to predict that once we launch into these accounts, after accountings which apparently may be some time less than the three years it looked like the way they were working on it before, that he is going to be a busy man on accountings. At the rate we are going on the inspection he has been a very busy man on that most of this year, and he is going to be, if we are to achieve any final accounting at all, also very busy for some little time in the future.

Certainly a special master doesn't have to take the burden that counsel takes. Maybe he can get paid if he fights through the Supreme Court, the Circuit Court of Appeals, all the writs that every-

body can pile up, and then get a third of [40] whatever the court allows him as a compromise to stop fighting for the rest of it. The special master is devoting his time to this case and should certainly have some money that he can depend upon for his living and overhead expenses, and he should have it periodically regardless of whether opposition counsel like it or not, and regardless of whether the clients that want to do all these appeals like it or not.

The only method I can see by which that can be achieved is the periodic recurring allowance, the amount of which is fixed now in an order of some sort, and probably after the appeal from that order goes through, whatever the final outcome will be, we will know that we have a special master to the end of the litigation.

The reason I can't help on amounts, I have been more than surprised by the attitude of counsel taking their money, as the testimony that they gave here in February discloses, without any contingency, a sum certain, payable the minute they render a bill from the funds in the hands of their clients, and appealing and objecting to the special master's allowance, which figures out on the total that he has of \$50,000 over almost three years thus far, at a far lower rate than they are taking from their own clients for services that certainly are not on the caliber and level of the special master, trying to reconcile and rule among the contending parties in this action. I don't see how anyone could ac-

cept [41] that kind of compensation at their own figures, figured at their own rate from their own clients, and if they want to fight opposing counsel, that I am not commenting on because that is something personal, but to fight the court's own officers and appeal on those matters, it doesn't seem to me that that is facilitating the orderly processes of the court.

The Court: I cannot exercise my judicial power on the question of whether or not anybody can or cannot appeal.

Mr. Chapman: No, your Honor, but I think you can make an order, and once it is affirmed on appeal it has some effect, to present that sort of tactics.

And on an interim allowance on account by the month, the day, the week or semi-annually, however it can be made, once that is affirmed on appeal the special master isn't going to have to be in here with another fee application fighting successive appeal after appeal.

The Court: How long do you think it is going to be before the present appeal is determined? How long will it be before they finish printing the record even?

Mr. Chapman: I would estimate—and this is the purest kind of guesswork—that there might be a printed record out somewhere around the turn of the calendar year. Whether or not the appellants will have their briefs in within the 30-day time limit or not, is another question. If they can,

they will have had to do most of their briefing before they [42] get the record.

Mr. Angell: If I can be of any assistance to the court on that, I would be glad to do so.

The Court: What is it?

Mr. Angell: I checked with the clerk, Mr. O'Brien, just before the 1st of November, and I understood that they would be finished by the 1st, and that the printing and the appeal from the injunction proceedings, the printed record, would be sent out to counsel shortly after the 1st of November. Apparently that hasn't been done. I understood that some 16 or 17 of the volumes of some 22 volumes, plus the index, the first volumes were to have been sent out. Apparently there has been a little delay there, but we are expecting that printed record any day now from what Mr. O'Brien tells us.

The Court: Do they expect to send the original records back here then?

Mr. Angell: I assume, your Honor, that that is the intent.

Now with respect to when the briefs will be in, so far as I know the briefs will be in on schedule, and there will be no turn of the year, and I am sure the Government expects to get their brief in within 30 days.

The Court: That is, the two appeals, the appeal on the injunction and the appeal from the special master's application? [43]

Mr. Angell: I am speaking now of the appeal on the injunction.

The Court: What about the appeal from the special master's fees?

Mr. Angell: The appeal from the injunction and the master's fees, I should think would come on at the same time regardless of how the briefs are filed. We have, as I recall, the 15 days after the filing of this printed record within which to designate the portion of the additional record to be printed, which should be very small, and short, and quickly printed.

The same is true in the appeal from the attorney fees. I think the record that is already printed will probably be enough to go on with, with what the court will allow us to bring up from the original records. So I do not anticipate these delays that you are speaking of here. Certainly they will not occur from the Bank.

The Court: We do not know now, then, when the last appeal on the special master's fees will be ready? Was that taken up coincidentally with the appeal from the allowance to O'Melveny & Myers?

Mr. Angell: It preceded the appeal from the attorney fees, as I recall it. It is appeal No. 2, as I recall it, and I believe the attorney fees is appeal No. 3.

The Court: The same record will be used in that as in [44] the injunction appeal?

Mr. Angell: Substantially in both of those appeals the record will be the same. It could be adverted to, as I understand it, by counsel from either side, and I am certain in the appellate court that they will allow the record to be augmented in

any way necessary to meet the necessities of counsel up above. They are very liberal in the use of that record. I do not anticipate that it will take very long to get that record up.

The Court: Is there any possibility that the parties would stipulate that the master may have such-and-such an allowance on account and his fee to be fixed and ultimately to be assessed as costs against the losing side?

Mr. Angell: In view of our jurisdictional objections, your Honor, we could not stipulate to the allowance of anything.

The Court: You can preserve your point and stipulate that the money may be paid out of funds in court and ultimately be assessed against the losing side. If you win, then the other fellow has to pay it.

Mr. Angell: We are making no objection to the court—I say “we”; I am speaking now of the San Francisco Bank—that the form of the order at this time should be on a monthly basis rather than a lump sum basis or part lump sum or part monthly. In fact, it might have some advantages because [45] then the appeal which we intend to take, your Honor, to preserve our jurisdictional rights, as we see them—and that would cover the appeal—would also cover the subsequent allowances month by month, and there would only be the one more appeal, instead of successive appeals until it is finally determined. But I personally would not be willing to enter into any stipulation with regard

to any invasion of the funds in the registry of the court for fear of waiving rights of my client.

Mr. Chapman: On the question of the appeals, your Honor, it is interesting to note——

The Court: Is there any doubt but what this discovery should proceed without the special master?

Mr. Angell: As stated at the last hearing when the same question came up, your Honor, if this court has jurisdiction, we are not objecting to the master being paid; we are objecting to the master being paid out of the funds in the registry of the court.

The Court: What I am getting at is this: Is there any doubt in your mind that this discovery here should proceed without a master?

Mr. Angell: As stated before, your Honor——

The Court: Preserving your point of jurisdiction, assuming that that were decided against you?

Mr. Angell: I certainly would not expect this court to [46] sit and hear the testimony that the master is hearing. I certainly would not.

The Court: Well, ordinarily discovery proceedings go on without any master being appointed, and in that case we will just turn the client and his lawyers loose in the other fellow's office.

Mr. Angell: Well, in so far as the San Francisco Bank is concerned, your Honor, it would make no difference to us because the records are all here anyway.

The Court: How about the Government and the official defendants, Mr. Fitting?

Mr. Fitting: You mean having the discovery continue without the special master?

The Court: Yes.

Mr. Fitting: Well, if the court please, I at one time suggested that it might save time and money if a lot of the files could be inspected just in the presence of the parties.

The Court: You at one time suggested it. What is your position now? Whom did you suggest that to?

Mr. Fitting: I suggested it informally to counsel and the master.

Mr. Chapman: I didn't hear that.

The Court: He suggested it informally to counsel and the master.

Mr. Chapman: That the inspection proceed in the presence [47] of whom?

Mr. Fitting: Just the counsel or anyone who wanted to inspect them.

The Court: Of all counsel?

Mr. Fitting: Or any counsel that wanted to inspect; yes.

The Court: In other words, just let the parties seeking discovery go down to the Bank and examine the records, as well as the Government records?

Mr. Fitting: No. My suggestion was that any of the records that we were willing to produce without argument be inspected by the parties there.

The Court: Well, counsel, what a litigant is willing to produce is not a matter of inspection.

Mr. Fitting: I think most of the files that have been inspected, if the court please, have been pro-

duced, aside from the initial objections to the inspection, have been produced before the master without objection.

The Court: It seems to me as though there are a great many objections that I hear. One day I was down there, is that not right, Mr. Special Master?

Mr. Walker: Yes. You heard a great many that day, your Honor. There have been numerous objections to specific items. True, a great mass of the material has been without objection made available. However, in many, many files there have been objections made, as I say, to individual letters. I have a [48] number of them under seal awaiting the final ruling of the court as to their admissibility. I can only point to the transcripts as to what transpired.

Mr. Chapman: Isn't that mostly what is in here, Mr. Walker?

Mr. Walker: Yes, except for the cover sheets, it is pretty much objections.

The Court: And there are 2200 pages, as I understand it.

Mr. Walker: Yes.

The Court: That does not seem to bear out your statement, Mr. Fitting.

Mr. Fitting: There has been a terrific volume of material that has been put in without inspection.

The Court: Are you authorized now——

Mr. Fitting: No, I am not authorized now.

The Court: ——to waive——

Mr. Fitting: No, your Honor.

The Court: —the requirement of the production of these records before a special master?

Mr. Fitting: I would be glad to communicate, though, to the Attorney General and ascertain his position thereon.

The Court: If they will waive it, in other words, permit the inspection without the presence of a special master, the special master is appointed, as I indicated before in connection with the inspection, to preserve what was urged as [49] the public interest, on the one hand, and, secondly, to permit the Bank to continue in operation without hindrance.

Mr. Fitting: Yes. So that I understand clearly, do I understand that to mean inspection without——

The Court: Anything that they want to inspect, that they have designated in their original designation—and, as I understand it, counsel has not withdrawn from any of it yet—that the objections are being cumulated and sooner or later will be passed on by the master and sooner or later will be passed on by this court, or some other court.

Mr. Fitting: Yes, except your Honor will recall the powers that you gave to the special master, that if the special master rules in favor of our objections the document is sealed.

The Court: That is right.

Mr. Fitting: To be preserved for your Honor.

The Court: Yes.

Mr. Fitting: And if the special master rules against us, the document is forthwith inspected.

The Court: Yes. Your question was whether or

not you should put up to the Attorney General what you should put up?

Mr. Fitting: Yes.

The Court: That is, to let the inspection proceed in accordance with the original demand for inspection of documents?

Mr. Fitting: Without the presence of the special master. [50]

The Court: Without a hearing before a special master or otherwise.

What is it, Mr. Walker?

Mr. Walker: Do you want to hear from me, your Honor?

The Court: Yes.

Mr. Walker: I don't want to appear to be trying to prolong a job which is not entirely pleasant in all of its features, but I cannot help but rise to warn the court that from what I have seen of the discovery proceedings in the bank, such a course would lead to utter chaos.

The Court: You mean chaos where?

Mr. Walker: In the bank. These gentlemen get along very well together, and they are all my good friends outside of the courtroom, but turn them loose without someone presiding over them and I fear for the results.

The Court: I understand the Bank is willing to waive the requirements and let the parties go in, in accordance with their original demand, and make inspection of all documents.

Mr. Bishop: No, your Honor.

Mr. Angell: I haven't been present at any of

the inspection proceedings except an isolated case once or twice, but it is my understanding, from up in the north, that all the books and records are down here and are in the possession of the special [51] master.

The Court: No, I think they are in the possession of the Bank.

Mr. Angell: Or the Bank. I know the reason we had to file the type of affidavit we filed today, is because we could get no figures or anything from the books or records in the San Francisco Bank in San Francisco.

The Court: Pointblank I am asking you whether or not the Bank will consent to let the inspection proceed of the Bank's records in accordance with the original demand without the supervision of a special master.

Mr. Angell: My understanding, your Honor, is that they have practically terminated that inspection.

Am I correct in that, or am I wrong?

Mr. Chapman: We haven't terminated.

Mr. Westover: We certainly have not. There are many records we have not yet even started on.

Mr. Chapman: I can show five filing cabinets of four drawers each the last time I was there of matters that I hadn't seen before.

Mr. Angell: If we are referring to supervisory files, which we do not consider any part of the San Francisco Bank's records but records belonging to the Board at Washington which may be within the

files of the San Francisco Bank, but certainly constituting no books or records of the Bank——

The Court: That may be, but nobody has ruled on that yet. [52]

Mr. Angell: Well, excluding that possibility, as far as I know, your Honor—and in which I would like to check with Mr. Dusenbery, who is general counsel in this case——

The Court: If you cannot give an answer without checking with Mr. Dusenbery, do not give a tentative answer.

Mr. Angell: I wouldn't give an answer then.

The Court: Very well. And neither can the Government?

Mr. Fitting: No, your Honor.

The Court: Very well.

Mr. Chapman: Still on the question of the special master's order, your Honor, I want to remind the court that the order that was made on March 9, 1950, from which the appeal was taken and is now pending, read, on page 4 at lines 7 to 10, as follows:

“This is an interim order and is not a final order terminating the issues material for the claim of fees for said special master as contemplated by Rule 54(b) FRCP, and the court reserves the power to modify, alter or amend this order at any time.”

I don't think plainer language could be used that this was not a final order and was not subject to appeal. Notwithstanding this, the appeal was taken

and the special master is wondering whether he has that money to spend or not.

The Court: I do not propose now to make any final order fixing the value of his services. This is only for an interim [53] allowance.

Mr. Chapman: I think there should be some periodic period, whether daily, monthly, weekly, semi-annually or not—I say the workman is worthy of his hire—and the special master has a tougher job than any of counsel. He has to receive all the arguments, try to weigh them and make a ruling.

As to an amount, without fixing it finally now in any way, I prefer not to express an opinion except to suggest that the court has made previous allowances and we haven't appealed from them, and whatever the court thinks is fair for the special master will be satisfactory to the Long Beach Association.

The Court: Does anybody else have anything to offer?

Mr. Walker?

Mr. Walker: Assuming that the allowance is made at this time, your Honor, for partial interim allowance up to date, period, I would frankly favor an order, if it could be made providing for a regular stipend by the month or by the quarter. I do not know whether that can be done or not.

The Court: That is, there would have to be some basis for it, either hourly or daily. If it is daily, you would have to define what is meant by a "day."

Mr. Walker: That would be very difficult to do.

The Court: Now a day is seven or eight hours work. Every lawyer knows, and every judge knows, that when the [54] special master has to leave his office and get someplace, or a lawyer, for a hearing at 10:00 o'clock that lasts until 12:00, he comes back at 1:30, and then goes on until 4:00 or 4:15, he does not have any time or energy left to earn a living otherwise. So that is a day. If there were some way of working it out so that it could be on an hourly basis or a monthly basis, I would allow it on that basis, but presently I do not see how it can be done.

Mr. Chapman: It doesn't seem to me, your Honor, that it needs to be that exact. This is an allowance on account. There isn't any question but what the special master has accumulated far more value in services than your previous allowance is going to be, and I don't think you have to wait in order to give him a certain amount in a certain specified period because the services are almost continuous. That has been shown by the past two and a half years of his services, and will be more arduous in the future, with five accountants supposed to start to work today at Long Beach and seven accountants due before the end of the week for at least the next four months.

The Court: It will probably be very easy to get along with those accountants, even with your accountants in the same room with them, compared to lawyers on a controversial matter.

Mr. Chapman: Nevertheless they are going to require the [55] special master's time. The dis-

covery proceedings is a long ways from over, the supervisory files are the real controversial matter, and there is filing case after filing case of those records.

And certainly the order is subject to modification at any time. If you make an order now for so much a month, and any party didn't think, at the end of six months, that that was proper they could apply for modification, and unless they did make that application for modification the record would continue to show that that was properly made on account.

The Court: I do not know that the master can continue to hear it regularly, so that I would be justified in a monthly amount.

Mr. Chapman: I don't say he would be overpaid, but he certainly has an accumulation now above all past allowances, and it must be a substantial amount, and he is going to continue to increase that accumulation day after day, week after week and month after month. Why he has to wait and come in here every six months or every nine months, or every year, and apply for something like that, I cannot see. I don't see why he shouldn't have a regular drawing account. This of course is not for the costs, the costs are something for an itemized bill—I am speaking now just of fees—but why there couldn't be something at least for this calendar year, since it is the end of 1950, unless something very different [56] happens in this litigation he will be busy all of next year, and if that did

happen the parties could inform the court and make application to suspend the allowance.

Mr. Westover: Your Honor please, I want to simply join Mr. Chapman's suggestion that since this is an interim allowance, the same as the prior fees that have been made to the master and counsel, and ultimately the court will review the overall picture——

The Court: And value.

Mr. Westover: ——and value and services rendered, and at that time all of the hourly rates could be taken into account, therefore on a monthly basis, which would at least give the special master a definite living expense——

The Court: You mean at that time you expect to put Mr. Walker's widow or his grandchildren on the stand?

Mr. Westover: No, at this time, your Honor, he would at least have a living wage to carry forward and be able to render the services that he is being required to render. Then at some period when this litigation, we hope, will ultimately end, the court would review the situation and allow the additional amount, whatever it was.

The Court: I will think about it a day or so. If there is some way that I can figure it out and allow it on an hourly basis or a monthly basis and make an order to that effect, I shall try to do so. If not, I think I will make an order [57] similar to the one that I did last time, an interim allowance without any idea of appraising the value of the services, and reserving to the court the right to ultimately

determine the value, and merely make an allowance on account.

Mr. Bishop?

Mr. Bishop: Your Honor, without waiving any legal position, and also keeping in mind the long association that there has been between Mr. Walker and myself, I think, however, it is my duty to the court at this time to point out why I believe I don't think we should be asked to consent or waive our position with reference to the necessity of a special master. I think the files and records of this case speak for themselves. It is no reflection on counsel on either side.

The Court: I am not asking you to do so; I am asking you whether or not you would do so.

Mr. Bishop: I want to show the importance of a master. After all, there have been thousands of documents that have been photostated, microfilmed, and for the very protection of the officers of the Bank that I work for, and I don't want it ever said that a document was lost while any of us were there. When you handle thousands of them in that way, if there wasn't some order involved, somebody actually keeping a real concise list of what is going on and what is going in and out for 20 years, whenever some employee—and I mean [58] no reflection on the employees—wants to say, "Oh, well, I can't answer that because that was lost during the discovery proceedings," I mean an institution as big as our bank——

The Court: I understand that, counsel, and you will recall that it was on the court's own motion

that I appointed a special master to supervise the discovery proceedings.

Mr. Bishop: Maybe I had no business making my remarks, but I wanted to refresh everybody's memory of the necessity for it, because I believe in it—and I am speaking for myself solely and alone. Now if the court, from my standpoint, desires that I request general counsel to ask whether we should waive a special master or not, I will be glad to do so.

The Court: I will think about the matter for a day or so. The matter will stand submitted.

(Whereupon, at 5:05 o'clock p.m., court was adjourned.)

[Endorsed]: Filed November 30, 1950. [59]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF EX PARTE
PROCEEDINGS

Appearances:

For Defendant Joe Crail (John Doe No. 9):

CRAIL and CRAIL,
315 West Ninth Street,
Los Angeles 15, California; by
HARRY G. McMAHON, ESQ. [2]

November 27, 1950, 10:00 A.M.

(Other court matters.)

The Court: That is all on this morning's calendar, Mr. Clerk?

The Clerk: Yes, your Honor.

The Court: Did you have a matter?

Mr. McMahon: There was one matter in *Malonee v. Fahey*, as I remember. I represent Joe Crail. A motion for a continuance was granted *ex parte* in the latter part of last week. You continued the matter until January 29, 1951. I would like to get an earlier setting on that for reasons which I will explain to the court, if you will bear with me.

There is on February 12th scheduled in Palm Beach a conference of the savings and loan industry. In that conference the directors and new directors of the San Francisco Federal Home Loan Bank Board wish to meet to discuss the establishment of a Los Angeles Federal Home Loan Bank. Now there have been statements made——

The Court: I would not be surprised but what they might be discussing it before then.

Mr. McMahon: They are discussing it tomorrow.

The Court: Today, is it not? The hearing starts today in Washington, the committee hearings.

Mr. McMahon: Yes, sir, they start today. [3*]

The Court: And it was indicated by counsel for the committee that they would all be subpoenaed to come to Los Angeles.

Mr. McMahon: Would be subpoenaed to Los Angeles?

The Court: That is correct, the members of the Home Loan Bank Board and all the directors of the San Francisco Bank and the Portland Bank.

* Page numbering appearing at top of page of original Reporter's Transcript of Record.

Mr. McMahon: Mr. Fischbach made that representation?

The Court: That was the notion that I got. In other words, the stipulation that was entered into at that time—by the way, have you made a formal appearance?

Mr. McMahon: Yes. I accepted service for Joe Crail named as John Doe 9. I examined the 1948 pleadings and injunction and I found no single reference to John Doe 9 either in the pleadings or in the prayer for any relief against him.

Now Joe Crail has been elected a director of the San Francisco Bank as of January 1, 1951, but there is no claim against John Doe 9 in any way, either as a director or individually, in the pleadings, and there are about five inches of them.

The Court: Five inches?

Mr. McMahon: From what I received service of.

The Court: You have not seen anything yet. There are about six filing cabinet drawers full of them, and the record on appeal in the interim order is only 24 printed volumes. [4]

Mr. McMahon: I am a young man, but I hate to go through all of that.

The Court: Have you appeared?

Mr. McMahon: Yes.

The Court: You have made a formal appearance for Joe Crail?

Mr. McMahon: Yes, by filing the motion to dismiss on behalf of Joe Crail, because no relief has been asked for against him and he is not mentioned in any of the pleadings which I was served with.

And then this ex parte motion for a continuance was granted, which I received notice of on Friday, and what I wish to do is to try to have my motion heard earlier, if possible, heard December 11th.

The Court: Counsel, there are I think something like 10 or 11 motions pending in the matter, motions for summary judgment, motions for this, motions for that, etc. I granted the motion for discovery and discovery proceedings are in progress, and I indicated to all counsel that I would hear none of the pending motions on their merits until the discovery had been completed.

Now it may be that your motion to dismiss as to Crail can be severed from the rest and may not be dependent upon any of the other discovery proceedings or accounting proceedings that are now going on. But I do not feel as though I would be justified in moving it up from January 29th, all [5] matters pending, because counsel are there now, the printed record on appeal was just delivered from the printers to various counsel last Friday and, as I say, it is 24 printed volumes up to now, 11,000 pages, and the index indicates that there are in excess of 15,000 pages, so there will be a number of additional volumes.

Counsel will have to get to work on their brief in connection with that matter. At the same time I am pressing them for completion of the accounting and the completion of the discovery proceedings in order that the whole merits of the litigation can move along if possible. So I do not think I would

be justified in advancing your date of hearing the motion.

Mr. McMahon: I can't appreciate why my client should even be served at this late date, that is the difficulty, unless it is because he was elected a director.

The Court: It is strange to me that he has not been served before. It seems to me that they have served everybody else in the eleven western states.

Mr. McMahon: You see, what they have done is they have prevented this conference for the establishment of the new Los Angeles Bank by serving Mr. Crail and by threatening to serve the other directors if they step foot inside of California. That is why the stipulation that they would not serve them if they came for the congressional sub-committee [6] hearing was made.

The Court: I do not think they threatened to serve them. I think probably the rest of them figured that they just would be served.

In any event, the stipulations were made and the indication was given that the basis for the request for the stipulation was the desire to hold hearings here, and have attend the hearings the officers of the Board and the officers of the Bank who resided in other states and who had up to now apparently been fearful of coming into the state of California.

Mr. McMahon: Yes, they have never been able to hold the San Francisco Bank meetings in California because of the suit, and they naturally don't want to become involved.

The Court: Well, the stipulation should free them so long as they are here on the congressional committee.

I am sorry, I cannot grant you your request. Your name was?

Mr. McMahon: McMahon, M-c-M-a-h-o-n, Harry.

The Court: Harry McMahon?

Mr. McMahon: Yes.

The Court: Very well.

Mr. McMahon: Thank you.

The Court: Are there any other matters?

The Clerk: No, your Honor.

(Whereupon, at 11:55 o'clock a.m., court was adjourned.) [7]

Certificate

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 27th day of November, A.D. 1950.

/s/ AGNAR WAHLBERG,
Official Reporter.

[Endorsed]: Filed March 26, 1951.

[Title District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 19,999 to 20,287, inclusive, contain all of the original papers, documents and exhibits filed in the above-entitled action from July 11, 1950, to November 9, 1950, inclusive, with the exception of the two bonds given as condition for order denying stay of execution filed September 22, 1950, but contains a full, true and correct photostatic copy of said bonds, and the original Two Notices of Appeal from the Order of November 9, 1950, photostatic copy of Costs Bond on Appeal, Designation of Contents of Record on Appeal Together With Joinder Therein by Official Defendants; Affidavit of Service by Mail; Motion and Order for Additional Time to Designate Contents of Record on Appeal; Order Extending Time for Filing Record and Docketing Appeal re Special Master's Partial Interim Fee Allowance; Designation by Appellees of Additional Portions of Record on Appeal and Affidavit of Service which, together with copy of Reporter's Transcript of Proceedings on October 23 and 25, 1950, transmitted herewith, and the transcripts of records in prior appeals in the above-entitled cause constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit from the Order for Partial Interim Allowance of Fees to Special Master.

Witness my hand and the seal of said District Court this 1st day of February, A.D. 1951.

EDMUND L. SMITH,
Clerk.

[Seal]: By /s/ THEODORE HOCKE,
Chief Deputy.

[Title District Court and Cause.]

CERTIFICATE OF CLERK TO
SUPPLEMENTAL RECORD

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 18, inclusive, contain the original Notices of Appeal of Defendants, etc., Home Loan Bank Board, et al., and Federal Home Loan Bank of San Francisco; Affidavit of Service by Mail; Designations of Contents of Record on Appeal by each of the appellants and Affidavit of Service by Mail which, together with the transcript of record heretofore certified to the U. S. Court of Appeals for the Ninth Circuit in these consolidated causes, constitute the transcript of record on these appeals from the Order for Partial Interim Allowance of Fees to Special Master to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 9th day of June, A.D. 1950.

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO
SUPPLEMENTAL TRANSCRIPT

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 20288 to 20364, inclusive, contain full, true and correct copies of minute orders entered November 16 and 17, 1950, and the original Stipulation and Order filed November 20, 1950, together with copy of reporter's transcript of proceedings on November 17, 1950, and the original Defendants' Objections to proposed Findings of Fact, Conclusions of Law and Order re Accounting of A. V. Ammann as Conservator which constitute a supplemental transcript of record on appeals to the United States Court of Appeals for the Ninth Circuit.

I further certify that the enclosed copies of reporter's transcript of proceedings on November 1, 1950, and November 27, 1950, are the Clerk's File copy of said proceedings.

Witness my hand and the seal of said District Court this 26th day of March, A.D. 1951.

[Seal] EDMUND L. SMITH,
Clerk.

[Endorsed]: No. 12575. United States Court of Appeals for the Ninth Circuit. John H. Fahey, et al., Appellants, vs. Ronald Walker, Special Master, Appellee, and Federal Home Loan Bank of San Francisco, Appellant, vs. Ronald Walker, Special Master, Appellee. Transcript of Record. Appeals from the United States District Court for the Southern District of California, Central Division.

Filed June 12, 1950.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12575

FAHEY, et al.,

Appellants,

vs.

RONALD WALKER,

Appellee.

FEDERAL HOME LOAN BANK OF SAN
FRANCISCO,

Appellant,

vs.

RONALD WALKER,

Appellee.

Statement of Federal Home Loan Bank of San
Francisco of Points To Be Relied Upon on This
Appeal

In accordance with Rule 19(6) of the Rules of
this Court, appellant Federal Home Loan Bank of
San Francisco makes this statement of Points To
Be Relied Upon on This Appeal.

I. The District Court lacked jurisdiction of the
consolidated actions in which the Special Master
was appointed, and therefore was without jurisdic-
tion to award fees to such Special Master.

II. The District Court lacked jurisdiction in
Federal Home Loan Bank of Los Angeles v. Fed-

eral Home Loan Bank of San Francisco (No. 5678—W.M. below), one of said consolidated actions, in that,

A. The members of the Home Loan Bank Board are indispensable parties to said action.

B. The said Board members have not and cannot be duly sued or served in said action.

1. The said Board members are non-residents of the State of California and have never been served therein.

2. The said Board members may not be sued or served as non-resident defendants in said action under 28 USC 1655 since said action is not one to enforce or remove a lien, etc., on property located within the State of California, and the relief prayed for cannot be granted save by a decree in personam against the said Board members, which is unauthorized by 28 USC 1655.

3. The said Board members have never made a general appearance in said action nor otherwise submitted to the jurisdiction of the District Court over their persons.

C. Neither the Federal Home Loan Bank of Los Angeles nor its shareholders have any justiciable interest sufficient to maintain said action.

D. Said action is an unconsented suit against the United States.

III. The District Court lacked jurisdiction in

Mallonee, et al. v. Fahey, et al. (No. 5421—PH below), the second of said consolidated actions, in that,

A. The claims in said second action are inseparable from those alleged in the other consolidated action.

B. Said second action involves a collateral attack on administrative orders complained of in said action.

C. The matters involved in said administrative orders are within the exclusive primary jurisdiction of the Home Loan Bank Board, and the parties allegedly aggrieved by said orders have failed to exhaust their administrative remedies.

D. The District Court lacked jurisdiction over the present and former members of the Home Loan Bank Board in said second action and said board members are indispensable parties to said action.

1. None of said present or former members are residents of the State of California, and none have been served therein.

2. The said present and former members cannot be sued or served in said second action as non-resident defendants under 28 USC 1655.

(a) The said second action was never one to enforce or remove a lien, etc., on property located within the State of California.

(b) Upon the termination of the appointment of defendant Ammann as conservator for the Long Beach Federal Savings and Loan

Association, the said action had for its sole object an in personam judgment for money damages which is unauthorized by 28 USC 1655.

3. The said present and former members cannot be sued or served under 28 USC 1335 or 2361, either in said second action or in the so-called cross-claims in interpleader or bills in the nature of interpleader filed in said action.

(a) Neither of said actions or cross-claims are civil actions of, or in the nature of, interpleader.

(b) None of said present or former members are claimants to any of the money or property in controversy within the meaning of 28 USC 1335 and 2361.

(c) The claims, if any, of said present and former members are asserted in their official capacities only and are thus the claims of the United States, which has not consented to be sued thereon.

4. None of said present or former members had ever made a general appearance or otherwise submitted to the jurisdiction of the District Court over their persons in said second action or other proceedings filed therein.

5. The claims for damages now contained in said second action are all predicated upon the alleged invalidity of the administrative orders appointing a conservator and the present and former members of the Home Loan Bank Board are necessary and

indispensable parties to the determination of such issue.

E. The said second action is an unconsented suit against the United States.

F. The District Court lacked jurisdiction over the Federal Savings and Loan Insurance Corporation.

1. Said corporation has never been served in the State of California.

2. Said corporation cannot be sued or served in the State of California, since it is not a California corporation, and neither does business in the State of California nor maintains any agent on whom service can be made in said State.

3. Said corporation cannot be sued or served as a non-resident defendant under 28 USC 1655, or 1335 and 2361, for the reasons specified in Points III D 2 and 3 above.

IV. Assuming, contrary to fact and law, that the District Court had jurisdiction of one or both the consolidated actions, the District Court erred in awarding master's fees out of funds on deposit in the Registry of the court.

A. The District Court lacked jurisdiction to enter the order dated March 29, 1948, requiring the deposit in the Registry of the court of notes, deeds of trust and other collateral owned and held by appellant Federal Home Loan Bank of San Francisco.

B. The award of master's fees from funds on deposit in court constitutes an unlawful invasion of the collateral securing notes of appellant Federal Home Loan Bank of San Francisco on deposit in court and the court's finding to the contrary is not supported in law or by the record.

C. The award of master's fees from funds on deposit in court is improper and erroneous for the reasons that:

1. There are no general funds contained in such deposit from which such award can be paid and any finding of the court to the contrary is not supported in law or by the record.

2. There is no showing or evidence in the record that any services of the master were rendered with respect to any dispute or controversy relating to any of the several proceedings in purported interpleader or intervention in connection with which the deposits were made or affecting any of such deposits.

V. Assuming, contrary to fact and law, that the District Court had jurisdiction of one or both the consolidated actions, the District Court erred in its award of master's fees.

A. There is no sufficient evidence from which to ascertain whether the award is fair and reasonable.

1. There is no sufficient showing of the services rendered by the master in each of the

several matters for which compensation is claimed.

2. The award fails to allocate the compensation among the several matters upon which services were rendered.

3. There is a total absence of itemization and proof of the services rendered.

B. There is no sufficient evidence that the services for which compensation is claimed were necessarily rendered in matters properly referred to the special master.

1. The District Court lacked jurisdiction of the accounting between the conservator, A. V. Ammann and the Long Beach Federal Savings and Loan Association or to refer such accounting to a special master.

2. The inspection proceedings referred to the special master are beyond the proper scope of Rule 34 F.R.C.P.

3. The special master is not entitled to compensation for services rendered in supervising settlement negotiations between the parties for the reason that no order of reference of such matter was or could have been made by the District Court which itself lacked jurisdiction to supervise such settlement negotiations.

4. The special master is not entitled to compensation for attendance at all hearings in said consolidated action and for other duties per-

formed without proper orders of reference and the court's finding that such services were necessary in connection with orders of reference actually made therein is not supported in law or by the record.

C. The original order appointing the special master specifically provides all special master's fees for services rendered within the scope of the order of the original appointment shall be paid by defendant and cross-complainant Long Beach Federal Savings and Loan Association. To the extent the order appealed from allows payment for such services from any funds in the Registry of the court, other than said Association's funds, such order violates the original order of appointment and is contrary to law.

D. The allowance of special master's fees payable from any funds in the Registry of the court other than the funds of the Long Beach Federal Savings and Loan Association for services rendered outside the purposes of the original order of appointment, was improper and contrary to law in that the expenses of such services must be borne in the first instance by the party initiating the proceedings which require the appointment of such special master, subject to such expenses being taxed

as costs upon the ultimate judgment in the case.

Dated: July 6, 1950.

Respectfully submitted,

VERNE DUSENBERY,
PHILIP H. ANGELL,
IRVING G. BISHOP,
SYLVESTER HOFFMANN,

By /s/ PHILIP H. ANGELL,
Attorneys for Appellant Federal Home Loan Bank
of San Francisco.

[Endorsed]: Filed July 7, 1950.

[Title of Court of Appeals and Cause.]

JOINDER OF APPELLANTS HOME LOAN
BANK BOARD, ET AL., IN STATEMENT
OF FEDERAL HOME LOAN BANK OF
SAN FRANCISCO OF POINTS TO BE
RELIED UPON ON THIS APPEAL

The appellants Home Loan Bank Board, an agency of the executive branch of the Government of the United States; William K. Divers, Chairman, and J. Alston Adams and O. K. LaRoque, Members of the Home Loan Bank Board; the Federal Savings and Loan Insurance Corporation, a corporate instrumentality of the United States, wholly owned by the United States; John H. Fahey, A. V. Ammann, and George K. Bramley hereby join in the "Statement of Federal Home Loan Bank of San Francisco of Points To Be Relied

Upon on This Appeal," filed in this Court on July 7, 1950, and adopt such statement as the Statement of Points To Be Relied Upon on This Appeal of these appellants, in accordance with Rule 19(6) of the Rules of this Court.

Dated: July 20, 1950.

ERNEST A. TOLIN,
United States Attorney.

CLYDE C. DOWNING, and
PAUL FITTING,
Asst. United States Attorneys.

By /s/ PAUL FITTING,
Attorneys for Appellants Home Loan Bank Board,
Wm. K. Divers, J. Alston Adams, O. K. La-
Roque, Federal Savings and Loan Insurance
Corporation, John H. Fahey, A. V. Ammann
and George K. Bramley.

Affidavit of Service by Mail attached.

[Endorsed]: Filed July 24, 1950.

[Title of Court of Appeals and Cause.]

MOTION FOR AN ORDER PERMITTING
REFERENCE TO PRINTED RECORD ON
APPEAL IN APPEAL ENTITLED
“FAHEY, ET AL., VS. MALLONEE, ET
AL.” NO. 12511 IN THE FILES OF THE
ABOVE-ENTITLED COURT, EXTENDING
TIME OF ALL PARTIES FOR DESIGNA-
TION OF PORTIONS OF RECORD FOR
PRINTING ON APPEAL, AND EXTEND-
ING TIME OF ALL PARTIES FOR FIL-
ING BRIEFS

Comes Now Federal Home Loan Bank of San Francisco, one of the appellants in the above-entitled appeal, and respectfully moves The Honorable, The United States Court of Appeals for the Ninth Circuit, ex parte, for and on behalf of all appellants herein, for its order that:

1. Reference may be made in the above-entitled appeal to the printed record on appeal in Fahey, et al., vs. Mallonee, et al., No. 12511 in the files of the above-entitled Court, and that it will not be necessary for any of the parties to this appeal to reprint in the above-entitled appeal any portions of the record printed in said appeal No. 12511;

2. Appellants shall have fifteen (15) days from and after the mailing by the clerk of the above-entitled Court of the printed record in said appeal No. 12511 within which to designate portions of the record to be printed in the above-entitled appeal, and appellee shall have fifteen (15) days after receipt of such designation by appellants within

which to counter-designate any additional portions of the record to be printed;

3. The time for filing appellants' opening briefs in the above-entitled appeal shall be calculated from the date upon which copies of the printed record in the above-entitled appeal are mailed by the clerk of said Court of Appeals.

The foregoing motion is made upon the written stipulation of the parties appellant and appellee filed concurrently herewith, and upon the further ground that the greater portion of the record required to be printed on appeal in the above-entitled appeal is now being printed in appeal entitled *Fahey, et al., vs. Mallonee, et al.*, No. 12511 in the files of the above-entitled Court, and that it will not be necessary for any of the parties hereto to reprint in the above-entitled appeal any portions of the record being printed in said appeal No. 12511, and that to require the reprinting of said portions of the record now being printed in said appeal No. 12511 would cost the parties to the above-entitled appeal thousands of dollars due to the large volume of said printed record.

Dated: August 7, 1950.

VERNE DUSENBERRY,
PHILIP H. ANGELL,
IRVING G. BISHOP,
SYLVESTER HOFFMANN,

By /s/ PHILIP H. ANGELL,

Attorneys for Appellant Federal Home Loan Bank
of San Francisco.

[Endorsed]: Filed August 8, 1950.

[Title of Court of Appeals and Cause.]

ORDER PERMITTING REFERENCE TO
PRINTED RECORD ON APPEAL IN AP-
PEAL ENTITLED "FAHEY, ET AL., VS.
MALLONEE, ET AL." NO. 12511 IN THE
FILES OF THE ABOVE-ENTITLED
COURT, EXTENDING TIME OF ALL PAR-
TIES FOR DESIGNATION OF PORTIONS
OF RECORD FOR PRINTING ON AP-
PEAL, AND EXTENDING TIME OF ALL
PARTIES FOR FILING BRIEFS

Good Cause Appearing Therefor and pursuant to the written stipulation of appellants and appellee in the above-entitled appeal, it is hereby ordered that:

Reference may be made in the above-entitled appeal to the printed record on appeal in Fahey, et al., vs. Mallonee, et al., No. 12511 in the files of the above-entitled Court and that it will not be necessary for any of the parties to this appeal to reprint in the above-entitled appeal any portions of the record printed in said appeal No. 12511;

Appellants shall have fifteen (15) days from and after the mailing by the clerk of the above-entitled Court of the printed record in said appeal No. 12511 within which to designate portions of the record to be printed in the above-entitled appeal, and appellee shall have fifteen (15) days after receipt of such designation by appellants within which to counter-designate any additional portions of the record to be printed;

The time for filing appellants' opening briefs in the above-entitled appeal shall be calculated from the date upon which copies of the printed record in the above-entitled appeal are mailed by the clerk of said Court of Appeals.

Dated: August 8, 1950.

/s/ WILLIAM DENMAN,
Chief Justice.

/s/ CLIFTON MATHEWS,

/s/ WILLIAM HEALY.

Justices of The United States Court of Appeals for
the Ninth Circuit.

[Endorsed]: Filed August 8, 1950.

EXHIBIT "A"

Partial Table of Documents Printed in Record on
Appeal in Fahey, et al., vs. Mallonee, et al.,
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Petition for Instructions, 2/18/48..	Vol. VIII 3608
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Interim Report and Petition for Interim Al- lowance on Fees for Special Master, 4/9/48	Vol. VIII 3884
Minute Order, April 19, 1948.....	Vol. IX 3978
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	(particularly 3981)
Motion for Production of Documents under Rule 34.....	Vol. XII 5399
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	(particularly 5467-6468)

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Order for Inspection, December 2, 1948.....	Vol. XII	5659
Second Interim Report of Special Master and Petition for Partial Interim Allowance of fees.....	Vol. XIII	6056
Minute Order, March 22, 1949.....	Vol. XIII	6340
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Petition for Partial Interim Allowance of Fees, October 25, 1949.....	Vol. XVII	8046
Minute Order Nov. 7, 1949.....	Vol. XVII	8145
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Order Supplementing Orders of Inspection, etc., dated October 22, 1948, and December 2, 1948, Feb. 7, 1950.....	Vol. XIX	8869
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		8993
Interim Report of Special Master on Prog- ress of Accounting and Discovery Proceed- ings and Petition for Partial Interim Allowance upon Fees, February 27, 1950....	Vol. XX	9263

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Objection and Points and Authorities to Petition of Special Master for Partial Interim Allowance Upon Fees.....	Vol. XX 9275
Answer of Fed. Home Loan Bank of S. F. to Interim Report and Objections to Allowance of Fees.....	Vol. XX 9281
Memorandum of Points and Authorities in Support	Vol. XX 9297
Order for Partial Interim Allowance of Fees to Special Master, March 9, 1950...	Vol. XX 9304
Respectfully submitted,	

ERNEST A. TOLIN,

United States Attorney, Southern District of California.

By /s/ ARLINE MARTIN,

Asst. United States Attorney.

/s/ WILLIAM F. McKENNA,

Assistant General Counsel, Home Loan Bank Board,
Attorneys for Appellants Home Loan Bank Board, William K. Divers, J. Alston Adams, O. K. LaRoque, the Federal Savings and Loan Insurance Corporation, John H. Fahey, A. V. Ammann and George K. Bramley.

VERNE DUSENBERRY,

PHILIP H. ANGELL,

BISHOP & HOFFMAN,

By /s/ PHILIP H. ANGELL,

Attorneys for Appellant Federal Home Loan Bank of San Francisco.

[Endorsed]: Filed December 1, 1950.

[Title of Court of Appeals and Cause.]

APPELLANTS' STATEMENT OF POINTS TO
BE RELIED UPON ON APPEAL FROM
ORDER OF NOVEMBER 9, 1950

In accordance with Rule 19.6 of the rules of this Court, appellants Home Loan Bank Board, an agency of the executive branch of the Government of the United States; William K. Divers, J. Alston Adams, O. K. LaRoque, the Federal Savings and Loan Insurance Corporation, a corporate instrumentality of the United States, wholly owned by the United States; John H. Fahey, A. V. Ammann, George K. Bramley and the Federal Home Loan Bank of San Francisco, a corporation, organized and existing under the laws of the United States and an instrumentality thereof, hereby make this joint statement of points to be relied upon on appeal from the order of the District Court of the United States in and for the Southern District of California, Central Division, entered November 9, 1950, in consolidated actions 5421—PH and 5678—WM allowing additional fees to the Special Master:

I. These appellants will rely on, and hereby incorporate to the same extent as though fully set forth herein, all of the points on appeal contained in the Statement of Federal Home Loan Bank of San Francisco of Points To Be Relied Upon on This Appeal filed herein on July 7, 1950, and constituting the statement of points on appeal from the order of said District Court dated March 9, 1950,

in said consolidated actions allowing fees to the Special Master.

II. These appellants will also rely upon the following additional points on appeal:

A. That the recitals and findings of said order allowing fees dated November 9, 1950, to the effect that it is essential that the inspection of documents continue under the Special Master is contrary to the evidence and to law.

B. That the recitals and findings of said order to the effect that it would be improper and unreasonable to assess fees of the Special Master against any parties to the proceeding or to allocate the value of said services to any particular phase of the services rendered is contrary to the evidence and to law.

C. That the recitals and findings of said court to the effect that a partial interim allowance of fees to the Special Master will not affect or impair the security or ultimate collectibility of notes of ap-

pellant Federal Home Loan Bank of San Francisco
is contrary to the evidence and to law.

Dated: February 28, 1951.

Respectfully submitted,

ERNEST A. TOLIN,

U. S. Attorney, Southern Dis-
trict of California.

ARLINE MARTIN, and

CLYDE C. DOWNING,

Asst. U. S. Attorneys.

WILLIAM F. McKENNA,

Asst. General Counsel, Home Loan Bank Board,
Attorneys for Appellants Home Loan Bank
Board, William K. Divers, J. Alston Adams,
O. K. LaRoque, the Federal Savings and Loan
Insurance Corporation, John H. Fahey, A. V.
Ammann and George K. Bramley.

VERNE DUSENBERY,

BISHOP & HOFFMANN,

ANGELL, HEARN & ADAMS,

PHILIP H. ANGELL,

By /s/ VERNE DUSENBERY,

Attorneys for Appellant Federal Home Loan Bank
of San Francisco.

[Endorsed]: Filed March 2, 1951.

No. 12578

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,
vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of
the Estate of Frank Rieber, Inc.,
Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

FILED

AUG 19 1930

PAUL P. O'BRIEN,

No. 12578

**United States
Court of Appeals
For the Ninth Circuit.**

UNITED STATES OF AMERICA,

Appellant,

vs.

**GEORGE T. GOGGIN, Trustee in Bankruptcy of
the Estate of Frank Rieber, Inc.,**

Appellee.

Transcript of Record

**Appeal from the United States District Court,
Southern District of California,
Central Division.**

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

ERNEST A. TOLIN,
United States Attorney

E. H. MITCHELL,
EDWARD R. McHALE,
Assistant U. S. Attorneys

EUGENE HARPOLE,
FRANK W. MAHONEY,
Special Attorneys, Bureau of Internal
Revenue,
600 U. S. Post Office & Court House
Bldg., Los Angeles 12, Calif.

For Appellee:

BATES S. HIMES,
725 Bartlett Bldg.,
215 W. 7th St.,
Los Angeles 14, Calif.

In the District Court of the United States for the Southern District of California, Central Division.

No. 44428-BH

CREDITOR'S PETITION FOR
INVOLUNTARY BANKRUPTCY.

In the Matter of Frank Rieber, Inc., a Corporation, in Bankruptcy.

To the Honorable Judges of the District Court of the United States for the Southern District of California:

The Petitions of Harry Kahan, Harry D. Seltzer and Norman Eckstein doing business as Kahan, Seltzer, & Eckstein of the City of Los Angeles, California, Frank Wilcox doing business as Wilcox Plastics Molding Company of the City of Los Angeles, California, and Herman A. Zierold and Elizabeth M. Zierold, doing business as Zierold Manufacturing Company of Burbank, California, respectfully represent:

I.

That Frank Rieber, Inc., is a corporation organized and existing under the laws of the State of California and has had its principal place of business and has resided at Los Angeles, California, within the above Judicial District for a longer portion of the six months immediately preceding the filing [2*] of this petition than in any other Judicial District.

II.

That the said Frank Rieber, Inc., owes debts to the amount of \$1000.00 or over, and said corporation is not a wage earner or a farmer.

III

That your petitioners are creditors of the said Frank Rieber, Inc., having provable claims against the said Frank Reiber, Inc., fixed as to liability and liquidated in amount, amounting in the aggregate in excess of the value of securities held by them to \$500.00; the natures and amounts of your petitioners claims are as follows:

That the said Kahan, Seltzer & Eckstein claim the sum of \$2947.99 for professional services rendered as certified public accountants, the said Wilcox Plastics Molding Company claims the sum of \$3672.82 for work, labor and materials furnished, and the said Zierold Manufacturing Company claims \$4268.09 for work, labor and materials furnished.

IV

That your petitioners further represent that the said Frank Rieber, Inc., is insolvent and that within four months next preceding the filing of this petition the said Frank Rieber, Inc., committed an act of bankruptcy in that as your petitioners are informed, believe, and therefore allege, the said Frank Rieber, Inc., did make on the 31st day of May, 1946, a general assignment for the benefit of creditors to M. W. Engleman of the City of Los Angeles.

* Page numbering appearing at top of page of original certified Transcript of Record.

Wherefore your petitioners pray that service of the petition, with a subpoena, may be made upon the said Frank Rieber, Inc., as provided in the Acts of Congress relating to [3] bankruptcy, and that the said Frank Rieber, Inc., may be adjudged by the court to be a bankrupt within the purview of said Act.

KAHAN, SELTZER & ECK-
STEIN

By /s/ HARRY D. SELTZER,
Partner.

WILCOX PLASTICS
MOLDING CO.

By /s/ FRANK WILCOX,
Owner.

ZIEROLD MANUFACTURING
COMPANY,

By /s/ HERMAN A. ZIEROLD,
Partner.

/s/ BATES S. HIMES,
Attorney for Petitioners. [4]

Oath to Petitioner

United States of America

Southern District of California ss.

Los Angeles County of California

Kahan, Seltzer & Eckstein, Wilcox Plastics Mold-
ing Co. & Zierold Manufacturing Company by their

duly authorized representatives, being three of the petitioners within named, do hereby make solemn oath that the statements contained in the foregoing petition, subscribed by them, are true.

/s/ HARRY D. SELTZER.

Subscribed and Sworn to before me this 7th day of June, 1946.

[Seal] /s/ J. SCOTT WELLER,

Notary Public in and for the County of Los Angeles, State of California.

/s/ FRANK WILCOX.

Subscribed and Sworn to before me this 7th day of June, 1946.

[Seal] /s/ BATES S. HIMES,

Notary Public in and for the County of Los Angeles, State of California.

/s/ HERMAN A. ZIEROLD.

Subscribed and Sworn to before me this 7th day of June, 1946.

[Seal] /s/ BATES S. HIMES,

Notary Public in and for the County of Los Angeles, State of California.

[Endorsed]: Filed June 7, 1946. [5]

[Title of District Court and Cause.]

ORDER OF GENERAL REFERENCE

At Los Angeles, California, in said district on the 7th day of June, 1946;

Whereas, a petition was filed in this court on the 7th day of June, 1946, against Frank Rieber, Inc., a corporation alleged bankrupt above named, praying that it be adjudged a bankrupt under the Act of Congress relating to bankruptcy, and good cause now appearing therefor;

It is ordered that the above-entitled proceeding be, and it hereby is, referred to H. L. Dickson, Esq., one of the referees in bankruptcy of this court, to take such further proceedings therein as are required and permitted by said Act, and that the said Frank Rieber, a corporation, shall henceforth attend before said referee and submit to such orders as may be made by him or by a judge of this court relating to said bankruptcy.

/s/ PAUL J. McCORMICK,

United States District Judge.

[Endorsed]: Filed June 7, 1946. [6]

[Title of District Court and Cause.]

ORDER OF ADJUDICATION

It appearing that an involuntary petition in bankruptcy was filed against the above alleged bankrupt on the 7th day of June, 1946, by Harry Kahan, Harry D. Seltzer and Norman Eckstein, doing business as Kahan, Seltzer & Eckstein, Frank Wilcox, doing business as Wilcox Plastics Molding Company, and Herman A. Zierold and Elizabeth M. Zierold, doing business as Zierold Manufacturing Company, and that on the same date there was a general order of reference to the undersigned as Referee in Bankruptcy.

It further appearing that the alleged bankrupt filed a consent to adjudication on June 22, 1946,

It is hereby ordered that the said Frank Rieber, Inc., a corporation, be, and it hereby is, adjudged a bankrupt according to the Acts of Congress relating to bankruptcy.

Dated: June 24, 1946.

/s/ HUGH L. DIXON,

Referee in Bankruptcy.

[Endorsed]: Filed June 24, 1946. [7]

[Title of District Court and Cause.]

STIPULATION

The parties hereto hereby stipulate and agree to the facts herein set forth and agree that the trustee's objections to the claim of the Collector of Internal Revenue for the Sixth Collection District of California shall be submitted upon such stipulated facts and such argument as shall be offered in connection therewith. The execution and filing of this Stipulation shall not preclude either party from offering and incuding such additional evidence as is not inconsistent therewith.

I.

The bankrupt herein, Frank Rieber, Inc., is, and at all times pertinent was, a corporation organized under the laws of the State of California.

II

The petition in bankruptcy was filed herein on June 7, 1946.

III

On August 9, 1946, an Order Regarding Certain Tax Liens was made and entered herein in which this Court determined that the bankrupt [8] estate's liability to the United States as set forth in items IV to VIII, inclusive, below were secured by duly recorded and valid liens on certain real property belonging to the bankrupt estate. Said order further determined that such liens were entitled to

priority and ordered that the real property be sold free and clear and the liens of the United States be transferred to the proceeds of the sale.

IV

The bankrupt estate's liability for excise taxes for December, 1945, through April, 1946, as assessed by the Commisioner of Internal Revenue, plus penalties thereon and interest accruing to June 7, 1946, (including interest and penalty assessed) is \$3456.78. If the United States is entitled to interest on secured tax claims until such claims are paid in full, the bankrupt estate is liable for additional interest in the amount of 6% per annum on \$3287.54 from June 7, 1946, until the date of payment.

V

The bankrupt estate's liability for Federal Insurance Contributions taxes for the fourth quarter of 1945, as assessed by the Commissioner of Internal Revenue, plus penalties thereon and interest accrued to June 7, 1946, (including interest assessed) is \$982.93. If the United States is entitled to interest on secured tax claims until such claims are paid in full, the bankrupt estate is liable for the payment of additional interest in the amount of 6% per annum on \$926.72 from June 7, 1946, until the date of payment.

VI

The bankrupt estate's liability for Federal insur-

ance contributions taxes for the first quarter of 1946, as assessed by the Commissioner of Internal Revenue, plus penalties and interest accrued to June 7, 1946, (including interest assessed) is \$1421.67. If the United States is entitled to interest on secured tax claims until such claims are paid in full, the bankrupt estate is liable for the payment of additional interest in the amount of 6% per annum on \$1348.90 from June 7, 1946, [9] until the date of payment.

VII

The bankrupt estate's liability for withholding taxes for the first quarter of 1946, as assessed by the Commissioner of Internal Revenue, plus penalties thereon and interest accrued to June 7, 1946, (including interest assessed) is \$7561.50. If the United States is entitled to interest on secured tax claims until such claims are paid in full, the bankrupt estate is liable for the payment of additional interest in the amount of 6% per annum on \$7174.48 from June 7, 1946, until the date of payment.

VIII

The bankrupt estate's liability for Federal insurance contributions taxes for the second quarter of 1946, as assessed by the Commissioner of Internal Revenue, is \$196.90.

IX

The bankrupt estate's liability for Federal unem-

ployment taxes for the year 1945, as assessed by the Commissioner of Internal Revenue, plus interest accrued to June 7, 1946, is \$1100.98.

X

The bankrupt estate's liability for withholding taxes for the second quarter of 1946, as assessed by the Commissioner of Internal Revenue, is \$946.15.

XI

On December 28, 1944, the Commissioner of Internal Revenue assessed income tax for the taxable year ending December 31, 1943, against the bankrupt in the amount of \$22,995.29, plus interest of \$387.93 computed to December 10, 1944. With respect to such assessed liability the bankrupt made payments of \$987.50 on March 15, 1944, \$5000.00 on September 15, 1944, \$5669.26 on October 18, 1944, \$5669.26 on November 15, 1944, \$5741.31 on December 15, 1944, and \$171.79 on March 27, 1945. [10]

On November 30, 1948, the Commissioner of Internal Revenue issued to the bankrupt a certificate of over-assessment in which he certified an over-assessment of income tax for the year 1943 in the amount of \$10,337.21. The bankrupt estate's correct liability for interest on income tax for 1943 (including interest assessed) is an amount equal to the sum of 6% per annum on \$2177.02 from March 15, 1944, to September 15, 1944; on \$3164.52 from June 15, 1944, to September 15, 1944; and on \$3506.06 from September 15, 1944, to October 18, 1944.

XII

On July 26, 1945, the Commissioner of Internal Revenue assessed income tax for the taxable year ended December 31, 1944, against the bankrupt in the amount of \$7,658.65, plus interest of \$19.15, computed to May 15, 1945. With respect to such assessed liability, the bankrupt made payments of \$1,933.82 on May 15, 1945, \$1,914.67 on June 15, 1945, and \$1,914.66 on September 17, 1945. On November 30, 1948, the Commissioner of Internal Revenue issued to the bankrupt a certificate of over-assessment in which he certified an over-assessment of income tax for the year 1944 in the amount of \$7,658.65, of which amount \$4,290.07 was attributable to allowance of carry-back of net operating loss under Section 122(b) of the Internal Revenue Code, as amended by the Revenue Act of 1942. If the United States is entitled to interest on unpaid income tax liability accruing currently in 1944 until carry-back deductions from subsequent years are available, the United States was entitled to interest for late payment of the first installment of the bankrupt's income tax for the year 1944 in an amount of \$10.73, and the bankrupt estate is, therefore, entitled to an additional over-assessment in an amount equal to the difference between \$19.15 and \$10.73, or \$8.42; but if the United States is entitled to interest only [11] on the difference between the income tax liability accruing currently in 1944 and over-assessments due to carry-back deductions from subsequent years, the bankrupt estate's total liability for late

payment of the first installment of income tax for 1944 was zero, and the bankrupt estate is entitled to an additional over-assessment of \$19.15.

XIII

For the taxable year 1945 the bankrupt's income tax return showed a tax liability of zero. On November 29, 1946, the Commissioner of Internal Revenue assessed a deficiency for income tax for the taxable year ended December 31, 1945, against the bankrupt in an amount of \$4,310.09, plus interest of \$182.32 computed to November 26, 1946. With respect to such assessed liability, the bankrupt made no payments. On November 30, 1948, the Commissioner of Internal Revenue issued to the bankrupt a certificate of overassessment in which he certified an over-assessment for income tax for the year 1945 in the amount of \$4,310.09, the entire amount of which was attributable to allowance of carry-back of net operating loss under Section 122(b) of the Internal Revenue Code, as amended by the Revenue Act of 1942. If the United States is entitled to interest on unpaid income tax liability accruing currently in 1945 until carry-back deductions from subsequent years are available, the bankrupt estate's liability for interest on unpaid income tax for 1945 is an amount equal to 6% per annum on \$4,310.09 from March 15, 1946, to June 7, 1946; but if the United States is entitled to interest only on the difference between the income tax accruing currently in 1945 and over-assessments due to carry-

back deductions from subsequent years, the bankrupt estate's liability for interest on unpaid income tax for 1945 is zero.

XIV

On December 28, 1944, the Commissioner of Internal Revenue assessed excess profits taxes for the taxable year ending December 31, 1943, against the bankrupt in the amount of \$13,068.45, plus interest of \$250.04, computed to December 10, 1944. On November 29, 1946, the [12] Commissioner of Internal Revenue assessed a deficiency in excess profits tax for the year 1943 against the bankrupt in the amount of \$73,899.49, plus interest of \$11,596.35, computed to November 29, 1946. With respect to such assessed liability the bankrupt made payments of \$2,500.00 on September 15, 1944, \$3,522.82 on November 15, 1944, \$3,570.59 on December 15, 1944, \$3,522.82 on October 18, 1944, and \$106.49 on March 27, 1945. On November 30, 1948, the Commissioner of Internal Revenue issued a certificate of over-assessment to the bankrupt in which he certified over-assessments for the year 1943 of excess profits tax in the amount of \$44,124.82, and of interest thereon in the amount of \$4,090.15, such over-assessments being reduced, however, to a total of \$43,802.49 on account of an excessive amount of post-war refund credit previously allowed. Of the amount of the over-assessment for excess profits tax, \$18,059.73 was attributable to allowance of carry-back of an unused excess profits credit under Section 710(c) of

the Internal Revenue Code, as amended by the Revenue Act of 1942. If the United States is entitled to interest on unpaid excess profits tax liability accruing currently in 1943 until carry-back credits from subsequent years are available, the bankrupt estate's liability for interest on excess profits tax liability for 1943 (including interest assessed) is an amount equal to the sum of 6% per annum on \$29,774.67 from March 15, 1944, to December 31, 1945; on \$26,797.20 from December 31, 1945, to June 7, 1946; and on \$18,059.73 from March 15, 1944, to June 7, 1946; but if the United States is entitled to interest only on the difference between the excess profits tax liability accruing currently in 1943 and over-assessments due to carry-back credits from subsequent years, the bankrupt estate's total liability for interest on excess profits tax for 1943 is an amount equal to the sum of 6% per annum on \$29,774.67 from March 15, 1944, to December 31, 1945; and on \$26,797.20 from December 31, 1945, to June 7, 1946.

XV

On July 26, 1945, the Commissioner of Internal Revenue assessed excess profits taxes for the year ending December 31, 1944, against the [13] bankrupt in the amount of \$1,998.28, plus interest of \$5.00 computed to May 15, 1945. On November 29, 1946, the Commissioner of Internal Revenue assessed a deficiency in excess profits tax for the year 1944 against the bankrupt in the amount of \$45,-470.13, plus interest of \$4,651.65, computed to No-

vember 26, 1946. With respect to such assessed liability, the bankrupt made payments of \$504.57 on May 15, 1945, \$499.57 on June 15, 1945, \$399.66 on September 17, 1945, and was allowed a post-war credit of \$199.83 on September 28, 1945. On November 30, 1948, the Commissioner of Internal Revenue issued a certificate of over-assessment to the bankrupt in which he certified over-assessments for 1944 of excess profits taxes in the amount of \$47,268.58 and of interest thereon in the amount of \$1,155.57. Of the over-assessment for excess profits tax, \$35,972.78 was attributable to an allowance of carry-back of unused excess profits credit under Section 710(c) of the Internal Revenue Code, as amended by Revenue Act of 1942. If the United States is entitled to interest on unpaid excess profits tax liability accruing currently in 1944 until carry-back deductions from subsequent years are available, the bankrupt estate's liability for interest on unpaid excess profits taxes for 1944 is an amount equal to the sum of 6% per annum on \$34,174.33 from March 15, 1945, to June 7, 1946; and on \$399.65 from December 15, 1945, to June 7, 1946; but if the United States is entitled to interest only on the difference between excess profits tax liability accruing currently in 1944 and over-assessments due to carry-back credits from subsequent years, the bankrupt estate's liability for interest on unpaid excess profits taxes for 1944 is zero.

XVI

The bankrupt's excess profits tax return for the year 1945 reported a liability of zero. On November 29, 1946, the Commissioner of Internal Revenue assessed a deficiency in excess profits taxes for the year 1945 against the bankrupt in the amount of \$29,566.98, plus interest of \$1,250.72, computed to November 29, 1946. With respect to such assessed liability, the bankrupt made no payments. On November 30, 1948, [14] the Commissioner of Internal Revenue issued a certificate of over-assessment to the bankrupt in which he certified an over-assessment for the year 1945 of excess profits tax in the amount of \$29,566.98 and of interest thereon in the amount of \$584.05. Of the over-assessment for excess profits tax, \$15,760.01 was attributable to an allowance of carry-back of unused excess profits credit under Section 710(c) of the Internal Revenue Code, as amended by the Revenue Act of 1942. If the United States is entitled to interest on unpaid excess profits tax liability accruing currently in 1945 until carry-back credits from subsequent years are available, the bankrupt estate's liability for interest on unpaid excess profits tax for 1945 is an amount equal to 6% per annum on \$15,760.01 from March 15, 1946, to June 7, 1946, but if the United States is entitled to interest only on the difference between excess profits tax liability accruing currently in 1945 and over-assessments due to carry-back credits from subsequent years, the bankrupt estate's liabil-

ity for interest on unpaid excess profits taxes for 1945 is zero.

XVII

The bankrupt estate has received the total sum of \$1,825.07 from the United States as interest due on overpayments of taxes for the taxable years 1943 and 1944.

Dated: This 27th day of April, 1949.

JAMES M. CARTER,
United States Attorney.

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistant U. S. Attorneys.

EUGENE HARPOLE,
ROBERT D. SCOTT, and
JAMES D. PETTUS,
Special Attorneys,
Bureau of Internal Revenue.

By /s/ EUGENE HARPOLE,
Attorneys for Harry C. Westover, Collector of Internal Revenue for the Sixth Collection District of California.

/s/ BATES S. HIMES,
Attorney for George T.
Goggin, Trustee in
Bankruptcy.

[Title of District Court and Cause.]

AMENDMENT TO STIPULATION
RE TAX CLAIMS

The parties hereto hereby stipulate and agree that the Stipulation filed herein concerning the claims for taxes of the Collector of Internal Revenue for the Sixth Collection District of California, dated April 27, 1949, shall be amended in the following particulars:

1. Paragraph XIV is amended to provide that in addition to the payments made by the bankrupt with respect to the assessed liability for excess profits taxes for the year 1943, the bankrupt was allowed a post-war credit of \$7,389.94.

2. Paragraph XIV is further amended to provide that the overassessment of excess profits tax certified by the Commissioner for the year 1943 in the amount of \$44,124.82 was reduced by \$4,412.48 on account of an excessive amount of post-war refund credit previously allowed, leaving an overassessment of tax in the amount of \$39,712.34, which with an over-assessment of interest in the amount of \$4,090.15 made a [16] total certified overassessment of \$43,802.49.

Dated: May 20th, 1949.

JAMES M. CARTER,
United States Attorney.

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistant U. S. Attorneys.

EUGENE HARPOLE,
ROBERT D. SCOTT,
JAMES D. PETTUS,
Special Attorneys,
Bureau of Internal Revenue

By /s/ EUGENE HARPOLE,
Attorneys for Harry C. Westover, Collector of Internal Revenue for the Sixth Collection District of California.

/s/ BATES S. HIMES,
Attorney for George T. Goggin, Trustee in Bankruptcy.

[Endorsed]: Filed May 24, 1949. [17]

[Title of District Court and Cause.]

ORDER ALLOWING TAX CLAIMS OF THE
UNITED STATES OF AMERICA

The United States of America having filed in the office of the Referee, through Harry C. Westover, Collector of Internal Revenue, a claim in the sum of \$167,458.55 dated December 2, 1946, and a claim in the sum of \$946.15 dated December 4, 1946, and said proofs of debts having been objected to by the Trustee, George T. Goggin, and the objections having come on for hearing before me, and a written stipulation of facts having been filed by the par-

ties; Bates S. Himes, Esq., appearing as attorney for the Trustee, and James M. Carter, United States Attorney for the Southern District of California; E. H. Mitchell and Edward R. McHale, Asistant United States Attorneys for said District; Eugene Harpole, Robert D. Scott and James D. Pettus, Special Attorneys for the Bureau of Internal Revenue, appearing for the United States of America; and due deliberation having been had and the matter having been submitted for decision and briefs filed, and the Court being fully advised makes the following Findings of Fact and Conclusions of Law: [18]

Findings of Fact

The facts stipulated by the parties herein under the date of April 27th, 1949, and amended under date of May 20, 1949, are hereby found and adopted by the Court as its findings of fact.

Conclusions of Law

1. The United States is entitled to interest at 6% per annum on tax claims covered by liens only up to the date on which the petition in bankruptcy was filed herein, viz., June 7, 1946.

2. The United States is entitled to interest at 6% per annum on income and excess profits taxes for the years 1943 to 1945, inclusive, only on such unpaid tax liability as remained after the allowance of overassessments attributable to carry-back de-

ductions and carry-back credits under Section 122 (b) and Section 710(c) of the Internal Revenue Code as amended by the Revenue Act of 1942.

3. The total unpaid tax liability of the bankrupt for the period covered by the claim of the Collector of Internal Revenue, 1943 to 1946, including penalties and interest, is \$28,599.51, which sum is computed as follows:

Liabilities

(Taxes assessed plus interest as determined herein)

Excise taxes, December 1945 through April 1946, plus penalties and interest to June 7, 1946	\$ 3,456.78
Federal Insurance Contributions taxes for fourth quarter 1945, plus penalties and interest to June 7, 1946	982.93
Federal Insurance Contributions taxes for first quarter 1946, plus penalties and interest to June 7, 1946..	1,421.67
Withholding taxes for first quarter 1946, plus penalties and interest to June 7, 1946	7,561.50
Federal Insurance Contributions taxes for second quarter 1946	196.90
Federal unemployment taxes for 1945 plus interest to June 7, 1946	1,100.98
Withholding taxes for second quarter 1946	946.15
1943 Income tax assessed	22,995.29
Interest as determined herein 6% per annum on :	
\$2,177.02 from Mar. 15, 1944 to Sept. 15, 1944.....	65.31
\$3,164.52 from June 15, 1944 to Sept. 15, 1944.....	47.47
\$3,506.06 from Sept. 15, 1944 to Oct. 18, 1944	19.26
1944 Income tax assessed	7,658.65
1945 Income tax assessed	4,310.09
1943 Excess profits tax assessed	13,068.45
1943 Excess profits tax deficiencies assessed	73,899.49

Interest as determined herein 6% per annum on :	
\$29,774.67 from Mar. 15, 1944 to Dec. 31, 1945.....	3,204.65
\$26,797.20 from Dec. 31, 1945 to June 7, 1946.....	700.96
1944 Excess profits tax assessed	1,998.28
1944 Excess profits tax deficiency assessed	45,470.13
1945 Excess profits tax deficiency assessed	29,566.98
<hr/>	
(1) Total assessed taxes plus correct interest as determined herein	\$218,671.92
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Payments, Credits and Overassessments of Tax

1943 Income Tax Payments:

March 15, 1944 payments	\$ 987.50
September 15, 1944 payments	5,000.00
October 18, 1944 payments	5,669.26
November 15, 1944 payments	5,669.26
December 15, 1944 payments	5,741.31
March 27, 1945 payments	171.79

Overassessment of 1943 income tax 10,337.21

1944 Income Tax Payments:

May 15, 1945 payments	1,933.82
June 15, 1945 payments	1,914.67
September 17, 1945 payments	1,914.66

Overassessment of 1944 income tax 7,658.65

Overassessment of 1945 income tax 4,310.09

1943 Excess Profits Tax Payments:

September 15, 1944 payments	2,500.00
November 15, 1944 payments	3,522.82
December 15, 1944 payments	3,570.59
October 18, 1944 payments	3,522.82
March 27, 1945 payments	106.49

1943 Post-War credit 7,389.94

Overassessment of 1943 excess profits tax 39,712.34

1944 Excess Profits Tax Payments:

May 15, 1945 payments	504.57
June 15, 1945 payments	499.57
September 17, 1945 payments	399.66
1944 Post-War Credit allowed September 28, 1945	199.83
Overassessment of 1944 excess profits tax	47,268.58
Overassessment of 1945 excess profits tax	29,566.98

(2) Total payments and credits 1943-1945 inclusive,
plus overassessment of income and excess tax
liabilities for such years\$190,072.41

Unpaid liability for taxes, penalties and interest,
1943-1946, inclusive (Item (1) minus item (2)).....\$ 28,599.51

Wherefore, it is hereby Ordered, Adjudged and
Decreed:

1. That the claims of the Collector of Internal
Revenue be and they are hereby allowed in the total
sum of \$28,599.51.

Dated: This 25th day of May, 1949.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

Approved:

/s/ BATES S. HIMES,
Attorney for George T. Goggin, Trustee in Bank-
ruptcy.

Approved as to Form:

JAMES M. CARTER,
United States Attorney.

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistant U. S. Attorneys.

EUGENE HARPOLE,
ROBERT D. SCOTT,
JAMES D. PETTUS,
Special Attorneys, Bureau of
Internal Revenue.

By /s/ EUGENE HARPOLE,
Attorneys for Collector of Internal Revenue for the
Sixth Collection District of California.

[Endorsed]: Filed May 24, 1949. [22]

[Title of District Court and Cause.]

PETITION FOR REVIEW OF REFEREE'S
ORDER DATED MAY 25, 1949

To Hugh L. Dickson, Referee in Bankruptcy:

The petition of the United States of America respectfully represents:

1. Petitioner is aggrieved by the Order made herein by the Honorable Hugh L. Dickson, Referee in Bankruptcy, dated May 25, 1949, a copy of which Order, and the Findings of Fact and Conclusions of Law, are attached hereto as Exhibit A and made a part hereof.

2. The Referee in Bankruptcy erred in respect of said Order in concluding as a matter of law that the United States is entitled to interest on tax claims covered by liens only up to the date of the filing of the petition in bankruptcy.

3. The Referee in Bankruptcy erred in respect of said Order in failing to allow the claim of the United States for interest on tax claims covered by liens up to the date of payment.

4. The Referee in Bankruptcy erred in respect of said Order in concluding as a matter of law that the United States is entitled to interest on income and excess profits taxes for the years 1943 to 1945 [23] inclusive only on such unpaid tax liability as remained after the allowance of overassessments attributable to carry-back deductions and carry-back

credits under Section 122(b) and Section 710(c) of the Internal Revenue Code as amended by the Revenue Act of 1942.

5. The Referee in Bankruptcy erred in failing to allow the claim of the United States for interest on that portion of the assessed and unpaid income and excess profits tax liability for the years 1943 and 1945 inclusive, which was subsequently allowed as an overassessment attributable to carry-back deductions and carry-back credits under Section 122(b) and Section 710(c) of the Internal Revenue Code as amended by the Revenue Act of 1942.

6. The Referee in Bankruptcy erred in concluding as a matter of law that the total unpaid tax liability of the bankrupt for the period covered by the claim of the Collector of Internal Revenue, 1943 to 1946, including penalties and interest, is \$28,599.51.

Wherefore Your Petitioner prays that said Order be reveiwd by a judge in accordance with the provisions of the Bankruptcy Act, as amended, that said Order be reversed, and that an Order be made allowing the United States payment of taxes, penalties and interest in accordance with the stipulations of the parties, including (1) interest to the date of payment on tax claims covered by liens and (2) interest on assessed and unpaid income and excess profits taxes for the years 1943 to 1945 inclusive, including that portion of such liability as was allowed as an overassessment attributable to carry-back deductions and carry-back credits under Section

122(b) and Section 710(c) of the Internal Revenue Code as amended by the Revenue Act of 1942.

Dated: This 28th day of July, 1949.

JAMES M. CARTER,
United States Attorney.

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistant U. S. Attorneys.

EUGENE HARPOLE,
ROBERT D. SCOTT, and
JAMES D. PETTUS,
Special Attorneys,
Bureau of Internal Revenue.

By /s/ EUGENE HARPOLE,
Attorneys for United States
of America.

[Endorsed]: Filed July 28, 1949. [24]

[Title of District Court and Cause.]

REFEREE'S CERTIFICATE OF REVIEW

To the Honorable Ben Harrison, District Judge:

I, Hugh L. Dickson, the Referee in Bankruptcy in charge of this proceeding, do hereby certify:

That, in the course of such proceeding, order was

made and entered on the 25th day of May, 1949, and signed by me as Referee. That by the terms of the Order, and by the findings of fact and conclusions of law contained therein, it appeared that the United States of America filed in these proceedings a claim for \$167,458.55, dated December 2, 1946, and a further claim for \$946.15, dated December 4, 1946, both claims being for taxes and interest. That the Trustee in Bankruptcy, George T. Goggin, filed written objections to said claims. That thereafter the United States of America, the claimant, and the said Trustee entered into a written stipulation of facts and also an amendment to the stipulation. That for the information of the Court said stipulations are submitted herewith. That it also appears that the said claimant, in addition to the taxes allowed by the Order of May 25 in the [31] sum of \$28,599.51, claims first, that it is entitled to interest at 6% per annum on the claims covered by liens not only up to the date of bankruptcy but beyond the date of bankruptcy, which was June 7, 1946, to the time of payment, petition in bankruptcy having been filed against the bankrupt on the 7th day of June, 1946; and secondly, claimant also claims interest on income and excess profits taxes for the years 1943 to 1945 from the date the same became due, but calculated on the tax as it existed before the allowance of over-assessments attributable to carry-back deductions and carry-back credits under Section 122(b) and Section 710(e) of the Internal Revenue Code, as amended by the Revenue Act of 1942. That a copy of said Order of May

25, 1949, is submitted herewith.

That on the 28th day of July, 1949, the United States of America in such proceeding, feeling aggrieved thereat, filed a petition for review, which was granted.

That the errors complained of by the United States Government are set forth in full in its petition, a copy of which is submitted herewith.

That a summary of the evidence upon which such Order is based is set forth in the stipulation and amendment above referred to. In summary, it appeared that the Order of May 25 allowed interest only to June 7, 1946, the date of bankruptcy, and denied the claimant interest beyond that date, and only allowed the claimant interest on excess profits taxes for the years 1943 to 1945 on the taxes assessed after application of over-assessments attributable to carry-back deductions and carry-back credits.

That the questions presented on this review are as follows, to-wit:

First: Is the claimant entitled to interest on tax claims covered by liens beyond the date of bankruptcy and up to the time of payment, or is the claimant by law allowed interest only to the date of bankruptcy? And secondly, and as a separate question, is the claimant entitled to interest on income and excess profits taxes on the unpaid tax liability of the bankrupt as it existed before, or as it existed after allowance of over-assessments attributable to carry-back deductions and carry-back credits.

I hand up herewith, for the information of the Judge, the following papers:

1. Stipulation of the parties,
2. Amendment to the stipulation of the parties,
3. Petition for review of United States Government,
4. Order of May 25, 1949, signed by Referee Dickson,
5. Brief of Harry C. Westover, Collector of Internal Revenue for the Sixth District of California,
6. Trustee's Points and Authorities on Objections to Claims of United States Government.
7. Trustee's reply to the Government's brief in connection with the trustee's objections to certain tax claims.

Dated: August 15, 1949.

Respectfully submitted,

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

Affidavit of Service by Mail attached.

[Endorsed]: Filed August 15, 1949.

[Title of District Court and Cause.]

MOTION AND ORDER EXTENDING TIME TO
FILE PETITION FOR REVIEW

Comes now the United States of America, by and through its attorneys, James M. Carter, United States Attorney for the Southern District of California, E. H. Mitchell and Edward R. McHale, Assistant United States Attorneys for said District, and Eugene Harpole, Robert D. Scott and James D. Pettus, Special Attorneys, Bureau of Internal Revenue, and moves the Referee that the time within which the United States may file a petition for review of the Referee's Order of May 25, 1949, upon the objections to the tax claim of the Collector of Internal Revenue mentioned in such Order, be extended to and including July 1, 1949.

Dated: June 3, 1949.

JAMES M. CARTER,
United States Attorney.

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistant U. S. Attorneys.

EUGENE HARPOLE,
ROBERT D. SCOTT and
JAMES D. PETTUS,
Special Attorneys,
Bureau of Internal Revenue
By /s/ EUGENE HARPOLE,

Attorneys for United States of America, and Harry
C. Westover, Collector of Internal Revenue.

It is so ordered this 3rd day of June, 1949.

/s/ DAVID B. HIND,
Referee in Bankruptcy.

[Endorsed]: Filed June 3, 1949. [36]

[Title of District Court and Cause.]

MOTION AND ORDER EXTENDING TIME TO
FILE PETITION FOR REVIEW

Comes now the United States of America, by and through its attorneys, James M. Carter, United States Attorney for the Southern District of California; E. H. Mitchell and Edward R. McHale, Assistant United States Attorneys for said District; Eugene Harpole, Robert D. Scott and James D. Pettus, Special Attorneys, Bureau of Internal Revenue, and moves the Referee that the time within which the United States may file a petition for review of the Referee's Order of May 25, 1949, upon the objections to the tax claim of the Collector of Internal Revenue mentioned in such Order, be extended to and including July 30, 1949.

Dated: June 29, 1949.

JAMES M. CARTER,
United States Attorney.

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistant U. S. Attorneys.

EUGENE HARPOLE,
ROBERT D. SCOTT, and
JAMES D. PETTUS,
Special Attorneys,
Bureau of Internal Revenue.

By /s/ ROBERT D. SCOTT,
Attorneys for United States of America, and Henry
C. Westover, Collector of Internal Revenue.

It is so Ordered this 29th day of June, 1949.

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: Filed June 20, 1949. [37]

[Title of District Court and Cause.]

ORDER REMANDING REVIEW
TO REFEREE

This review presents two questions as follows:

1. Is the United States as claimant entitled to interest on tax claims covered by liens beyond the dates of bankruptcy and up to the time of payment, or is the claimant by law allowed interest only to the date of bankruptcy?

2. Is the United States as claimant entitled to

interest on incomes and excess profits taxes on the unpaid tax liability of the bankrupt as it existed before, or as it existed after allowance of over-assessments attributable to carry back deductions and carry back credits?

Under the first question I hold with the referee. I do not consider the case of *Sampsell vs. U.S.*, 153 F.(2d) 731, applicable to the present situation. In the *Sampsell* case I was dealing with mortgaged property that was sufficient to pay the debt in full and to have held that the interest stopped upon an adjudication in bankruptcy would have destroyed the contractual lien rights of the mortgagee. I feel the first question is controlled by the case of *City of New York vs. Saper*, [38] *Trustee in Bankruptcy*, 336 U.S. 328.

The second question is answered by the recent decision of the Supreme Court rendered on February 6, 1950, in the case of *John E. Manning, Etc., vs. Seeley Tube and Box Company, Etc.*, reversing the Third Circuit. The Referee followed the Third Circuit decision and therefore fell into error.

In view of the recent decision of the Supreme Court this matter is remanded to the Referee with instructions to conform to the opinions herein expressed.

Dated: This 20th day of April, 1950.

/s/ BEN HARRISON,
Judge.

[Endorsed]: Filed April 20, 1950. [39]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America, a creditor and claimant in the above entitled bankruptcy proceeding, hereby appeals to the Court of Appeals for the Ninth Circuit from that portion of the order of the United States District Court for the Southern District of California dated April 20, 1950, which holds that the United States, as a claimant, is not entitled to interest upon its tax claims covered by liens beyond the date of bankruptcy and up to the time of payment, but is entitled by law to interest upon those claims only to the date of bankruptcy, and which order remanded the review upon that question to the Referee in Bankruptcy with instructions to conform to the opinion of the District Court. The order appealed from was entered on April 20, 1950.

Dated: May 18, 1950.

ERNEST A. TOLIN,
United States Attorney.

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistant U. S. Attorneys.

EUGENE HARPOLE, and
FRANK W. MAHONEY,
Special Attorneys,
Bureau of Internal Revenue.

By /s/ EUGENE HARPOLE,
Attorneys for Claimant Appellant, United States of
America.

[Endorsed]: Filed May 19, 1950. [40]

[Title of District Court and Cause.]

APPELLANT'S STATEMENT OF POINTS
TO BE URGED UPON APPEAL

To: George T. Goggin, Trustee in Bankruptcy of
Frank Rieber, Inc., a corporation, and Bates S.
Himes, his attorney:

You, and Each of You, Will Please Take Notice
that under the provisions of Rule 75 of the Rules of
Civil Procedure of the District Courts of the United
States, the appellant intends to rely upon the fol-
lowing points in the appeal of the above entitled
case:

1. The District Judge erred in holding that the
United States is entitled to interest on its tax claims
which were covered by liens filed prior to the date
of bankruptcy only to the date of bankruptcy.

2. That the District Court erred in failing to
hold that the United States is entitled to interest
upon its tax claims which were secured by liens

filed prior to the date of bankruptcy [41] to the time that payment of said tax lien is made.

Dated: May 17, 1950.

ERNEST A. TOLIN,
United States Attorney.

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistant U. S. Attorneys.

EUGENE HARPOLE, and
FRANK W. MAHONEY,
Special Attorneys,
Bureau of Internal Revenue.

By /s/ EUGENE HARPOLE,
Attorneys for Claimant Appellant, United States of
America.

[Endorsed]: May 19, 1950. [42]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF THE
RECORD ON APPEAL

To the Clerk of the Above Entitled Court:

You are hereby requested to include in the Record on Appeal from the order of the District Court dated April 20, 1950, the following:

1. Petition in Bankruptcy.
2. Order of Adjudication.
3. Stipulation.
4. Amendment to Stipulation Re Tax Claims.
5. Order Allowing Tax Claims of the United States of America.
6. Motion and Order Extending Time to File Petition for Revivew.
7. Motion and Order Extending Time to File Petition for Review.
8. Petition for Review of Referee's Order dated May 25, 1949.
9. Referee's Certificate of Review.
10. Order Remanding Review to Referee.
11. Notice of Appeal.
12. Appellant's Statement of Points to be Urged Upon Appeal. [43]
13. Appellant's Designation of the Record on Appeal.

Dated: May 19, 1950.

ERNEST A. TOLIN,
United States Attorney.

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistant U. S. Attorneys.

EUGENE HARPOLE, and
FRANK W. MAHONEY,
Special Attorneys,
Bureau of Internal Revenue.

By /s/ EUGENE HARPOLE,
Attorneys for Claimant Appellant, United States of
America.

[Endorsed]: Filed May 19, 1950. [44]

[Title of District Court and Cause.]

SUPPLEMENT TO REFEREE'S
CERTIFICATE ON REVIEW

To the Honorable Ben Harrison, Judge of the
United States District Court for the Southern
District of California, Central Division:

There has been requested herein that the following documents be added to the Referee's Certificate filed herein on August 16, 1949:

1. Motion and Order Extending Time to File Petition for Review dated June 3, 1949.
2. Motion and Order Extending Time to File Petition for Review dated June 29, 1949.

Dated: June 9, 1950.

Respectfully submitted,

/s/ HUGH L. DICKSON,
Referee in Bankruptcy.

[Endorsed]: June 9, 1950. [35]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 46, inclusive, contain the original Creditor's Petition for Involuntary Bankruptcy; Order of General Reference; Order of Adjudication; Stipulation; Amendment to Stipulation re Tax Claims; Order Allowing Tax Claims of the United States of America; Petition for Review of Referee's Order dated May 25, 1949; Referee's Certificate on Review; Supplement to Referee's Certificate on Review; Two Motions and Orders Extending Time to File Petition for Review; Order Remanding Review to Referee; Notice of Appeal; Statement of Points on Appeal; Designation of Record on Appeal and Proof of Service of Notice of Appeal, etc., which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 15th day of June, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE LOCKE,
Chief Deputy.

[Endorsed]: No. 12578. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. George T. Goggin, Trustee in Bankruptcy of the Estate of Frank Rieber, Inc., Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 16, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Undocketed

UNITED STATES OF AMERICA,

Appellant,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of
the Estate of Frank Rieber, Inc., Bankrupt,
Appellee.

APPELLANT'S STATEMENT OF POINTS
TO BE RELIED UPON ON APPEAL

Pursuant to the provisions of Rule 19(6) of the Rules of Practice of the United States Court of Appeals for the Ninth Circuit, Appellant hereby designates the following points upon which it intends to rely in its appeal in the above entitled case:

1. The District Judge erred in holding that the United States is entitled to interest on its tax claims, which were covered by liens filed prior to the date of Bankruptcy, only to the date of bankruptcy.

2. That the District Court erred in failing to hold that the United States is entitled to interest upon its tax claims, which were secured by liens filed prior to the date of bankruptcy, to the time that payment of said tax is made.

Dated: This 12th day of June, 1950.

ERNEST A. TOLIN,

United States Attorney.

United States of America

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistant United States
Attorneys.

EUGENE HARPOLE, and
FRANK W. MAHONEY,
Special Attorneys,
Bureau of Internal Revenue.

By /s/ EUGENE HARPOLE,
Attorneys for Appellant,
United States of America.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 16, 1950.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF PARTS
OF RECORD BELIEVED NECESSARY
FOR CONSIDERATION ON APPEAL AND
TO BE PRINTED

Pursuant to Rule 19(6) of this Court, Appellant hereby designates the following parts of the record as being necessary for consideration of the points upon which it intends to rely in this appeal, and desires to have printed, omitting the title of court and cause from each of the documents designated for printing:

Pages of Certified Record and Documents.

1. Page 1:
Names and addresses of attorneys.
2. Pages 2-5, inclusive:
Petition for Involuntary Bankruptcy.
3. Page 6:
Order of General Reference.
4. Page 7:
Order of Adjudication.
5. Pages 8-15, inclusive:
Stipulation.
6. Pages 16-17, inclusive:
Amendment to Stipulation.
7. Pages 18-22, inclusive:
Order Allowing Tax Claims.

8. Pages 23-24, inclusive:
Petition for Review, omitting "Exhibit A,"
which is a copy of item 7, above.
9. Pages 31-33, inclusive:
Referee's Certificate on Review.
10. Page 35:
Supplement to Referee's Certificate on Review.
11. Page 36
Order extending time to file petition on Review.
12. Page 37:
Order extending time to file petition on Review.
13. Pages 38-39, inclusive:
Order Remanding Review to Referee.
14. Page 40:
Notice of Appeal.
15. Pages 41-42, inclusive:
Appellant's Statement of Points to be urged on
appeal (District Court).
16. Pages 43-44, inclusive:
Appellant's Designation of Record on Appeal
District Court).
17. This Designation.
18. Appellant's Statement of Points to be Relied
Upon (Circuit Court).

Dated: This 12th day of June, 1950.

ERNEST A. TOLIN,
United States Attorney.

E. H. MITCHELL, and
EDWARD R. McHALE,
Assistant United States
Attorneys.

EUGENE HARPOLE, and
FRANK W. MAHONEY,
Special Attorneys,
Bureau of Internal Revenue.

By /s/ EUGENE HARPOLE,
Attorneys for Appellant,
United States of America.

Receipt of Copy acknowledged.

[Endorsed]: Filed June 16, 1950.

No. 12,578

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of the Estate
of Frank Rieber, Inc.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

THERON LAMAR CAUDLE,
Assistant Attorney General.

ELLIS N. SLACK,
A. F. PRESCOTT,
FRED E. YOUNGMAN,
Special Assistants to the Attorney General.

ERNEST A. TOLIN,
United States Attorney.

E. H. MITCHELL,
EDWARD R. McHALE,
*Assistant United States
Attorneys.*

EUGENE HARPOLE,
*Special Attorney, Bureau
of Internal Revenue.*

Federal Building, Los Angeles 12,

FILED

OCT 16 1950

PAUL P. O'BRIEN

CLERK

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No. 12,578

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of the Estate
of Frank Rieber, Inc.,

Appellee.

BRIEF FOR THE UNITED STATES.

Opinion Below.

The only opinion rendered by the District Court is its unreported Order Remanding Review to Referee. [R. 34-35.]

Jurisdiction.

This proceeding arose in the United States District Court for the Southern District of California, Central Division, upon an involuntary petition in bankruptcy filed on June 7, 1946, pursuant to Section 59 of the Bankruptcy Act, as amended, by certain creditors of Frank Rieber, Inc., a California corporation with its principal place of business at Los Angeles, California. [R. 2-5.] An order of general reference was entered on the same date [R. 6],

and an order adjudicating Frank Rieber, Inc., bankrupt was entered on June 24, 1946. [R. 7.] Jurisdiction of the court below is conferred by Section 2 of the Bankruptcy Act, as amended, and Section 24, Nineteenth, of the Judicial Code. Under date of May 25, 1949, the referee in bankruptcy entered an order allowing in part, with interest to the date of bankruptcy, certain tax claims of the United States, disallowing the balance of such tax claims, and disallowing the claim of the United States for interest from the date of bankruptcy to the date of payment on those of its tax claims which were secured at the date of bankruptcy by recorded liens on the property of the bankrupt. [R. 20-24.] Pursuant to extensions of time granted therefor [R. 32-34], a petition for review of the order of the referee entered May 25, 1949, was duly filed by the United States on July 28, 1949. [R. 26-28.] On April 20, 1950, the District Court entered an "Order Remanding Review to Referee" in which it affirmed in part and reversed in part the order of May 25, 1949. [R. 34-35.] Notice of appeal from this order of the District Court was duly filed by the United States on May 19, 1950, pursuant to Section 25(a) of the Bankruptcy Act, as amended. [R. 36.] Jurisdiction of this Court to hear and determine this appeal is conferred by Section 24(a) of the Bankruptcy Act, as amended, and 28 U. S. C., Section 1291.

Question Presented.

The only question involved is whether the United States is entitled to receive interest to date of payment on unpaid taxes which were secured by recorded liens prior to bankruptcy, instead only to the date of bankruptcy as held by the court below.

Statutes Involved.

The pertinent provisions of the Internal Revenue Code and the Bankruptcy Act are printed in the Appendix, *infra*, pages 1-5.

Statement.

This appeal arises out of an involuntary proceeding in bankruptcy against Frank Rieber, Inc., a California corporation, which was adjudicated bankrupt on June 24, 1946. [R. 7.] The matter here in controversy arises out of certain claims filed with the trustee in bankruptcy by the Collector of Internal Revenue for the Sixth Collection District of California covering unpaid federal taxes owed by the bankrupt for periods prior to bankruptcy, to which claims the trustee objected. Most of the facts relating to the claims of the United States for unpaid taxes were covered by stipulations of the parties. [R. 8-20.] By their stipulation [R. 8-18], and an amendment thereto [R. 19-20], the parties agreed to the kind and correct amount of unpaid taxes due for the several periods covered by the Collector's claims, leaving for determination by the referee only two questions relating to the allowance of interest due the United States on the agreed tax liability of the bankrupt for the periods involved. One of these issues since has been concluded in favor of the United States by the District Court [R. 34-35], leaving for determination on this appeal only the question whether the United States is entitled to interest to the date of payment, or only to the date of bankruptcy as held by the referee [R. 20-24] and the court below [R. 34-35], on that portion of its tax claims which was secured by duly recorded liens on the property of the bankrupt prior to bankruptcy. With respect to this issue it was stipulated by the parties

that an order was entered in the court below on August 9, 1946, regarding certain tax liens wherein it was determined that the bankrupt estate's liability to the United States, as set forth below, was "secured by duly recorded and valid liens on certain real property belonging to the bankrupt estate," and that "such liens were entitled to priority" [R. 8-10]:¹

¹Paragraph III of the stipulation [R. 8-9] indicates that the United States had a valid recorded lien for Federal Insurance Contribution Act taxes for the second quarter of 1946 in the sum of \$196.90 mentioned in paragraph VIII of the stipulation, which would not be due until after the date of bankruptcy [R. 10]. However, the order of August 9, 1946, which is attached as Exhibit H to the affidavit of Eugene Harpole, special attorney for the Bureau of Internal Revenue, in support of the motion presented to this Court on September 25, 1950, for leave to supplement the record on appeal herein, indicates instead that the United States had a lien, dated May 14, 1946, for the \$1,100.98 federal unemployment taxes for the year 1945 mentioned in paragraph IX of the stipulation. [R. 10-11.] Also, it will be noted that the amounts shown in the order of August 9, 1946, vary slightly from the amounts shown in paragraphs IV, V, VI, VII, and IX of the stipulation [R. 9-11], the difference no doubt being the result of an agreement of the parties as to the correct amount of tax and interest to June 7, 1946, with respect to each amount and period involved. In form the stipulation is an agreement as to the amount and kind of tax for each period with interest to date of bankruptcy, with the lesser amount in each instance representing the correct amount of tax due upon which interest, if held to be allowable, would be computed from date of bankruptcy.

Kind of taxes	Period involved	Amount
Excise	Dec., 1945, through April, 1946	\$ 3,287.54
Federal Insurance Contributions	4th quarter, 1945	926.72
Federal Insurance Contributions	1st quarter, 1946	1,348.90
Withholding	1st quarter, 1946	7,174.48
Total		<u>\$12,737.64²</u>

²Except for the form of the stipulation the sum of \$1,100.98 referred to in paragraph IX of the stipulation [R. 10-11] should be added to this amount rather than the \$196.90 referred to in paragraph VIII of the stipulation. [R. 10.]

The order of August 9, 1946, further ordered that the real property subject to the tax liens of the United States be sold free and clear and that the liens of the United States be transferred to the proceeds of the sale. [R. 9.]

The question reserved by the parties in their stipulation for decision of the referee in bankruptcy, so far as the above tax claims are concerned, was whether the Government is entitled to interest on these secured claims at the rate of six per cent per annum until paid or only to June 7, 1946, the date of the petition in bankruptcy was filed. In an order entered May 25, 1949 [R. 20-24], allowing the above and other claims of the United States for unpaid taxes and interest in the aggregate amount of \$28,599.51, the referee in bankruptcy allowed interest on the above secured claims only to June 7, 1946, the date of bankruptcy. The United States filed a petition for review of this order to the extent, among other things, that the referee denied the Government's claim for interest to the date of payment on its claims for taxes which were secured by duly recorded liens. [R. 26-28.] In an "Order Remanding Review to Referee" entered April 20, 1950, the court below affirmed this part of the order of the referee in bankruptcy. [R. 34-35.] This appeal is from that portion of the order of April 20, 1950. [R. 36.]

While this Court may find the facts just stated, all from the printed record on review herein, sufficient to determine the legal question involved the United States nevertheless has filed a motion, which was taken under advisement by

this Court following a hearing thereon on September 25, 1950, to supplement the record on appeal to include certain documentary evidence which was before the referee in bankruptcy at the time he entered his order of May 25, 1949. These additional records, which were not referred to in the referee's certificate on review [R. 28-31], show, among other things, that the real property of the bankrupt to which the Government's liens attached was sold free and clear of such liens for the sum of \$52,000, and that at the time of the trustee's first report and account (filed October 4, 1946) of personal property of the bankrupt (to which the Government's liens also attached under Section 3670 of the Internal Revenue Code) had already been sold for an amount in excess of \$45,000. See Exhibits B, C, F, G, I and J attached to the affidavit in support of the foregoing motion to supplement the record on appeal herein.

Statement of Points to Be Urged.

The United States relies upon the following errors as a basis for this appeal [R. 37-38]:

The District Court erred in holding that the United States is entitled to interest on its tax claims which were secured by valid liens filed prior to the date of bankruptcy only to the date of bankruptcy and in failing to hold that the United States is entitled to interest on such secured claims to the date of payment of such claims.

Summary of Argument.

As a general rule, a creditor of a bankrupt is entitled to interest on his claim only to the date of bankruptcy. There is an exception to this rule, however, in the case of a secured creditor. A secured creditor is entitled to have his claim paid in full with interest to the date of payment if the security is sufficient.

A lien of the United States for unpaid taxes is entitled in bankruptcy proceedings to the same dignity as any other lien upon property of the bankrupt, and under settled principles of law the United States was entitled to interest on its lien claims to date of payment. The liens of the United States for unpaid taxes in this case were liens upon all of the property and rights to property of the bankrupt, not just upon the real property sold free and clear, and the value of the property covered by the liens of the United States was sufficient to pay its lien claims in full. Accordingly, the referee and the court below erred in refusing to allow interest on the secured claims after the date of bankruptcy.

ARGUMENT.

The United States Is Entitled to Receive Interest to the Date of Payment on Such of Its Tax Claims as Were Secured by Valid Recorded Liens Prior to Bankruptcy.

It seems now too well settled for extended argument, both by the decision of this Court in *United States v. Sampsell*, 153 F. 2d 731, and by numerous other decisions, that a secured creditor is entitled in a bankruptcy proceeding to payment of his claim in full with interest to the date of payment if the security is adequate for that purpose. See *Coder v. Arts*, 152 Fed. 943 (C. A. 8th), affirmed 213 U. S. 223; *Oppenheimer v. Oldham*, 178 F. 2d 386 (C. A. 5th); *Georgia, Florida & Alabama R. Co. v. Bankers Trust Co.*, 170 F. 2d 733 (C. A. 5th); *In re Chicago, R. I. & P. Ry. Co.*, 155 F. 2d 889 (C. A. 7th); *Wilson v. Dewey*, 133 F. 2d 962 (C. A. 8th); *Sehon-Stevenson & Co. v. Union Trust Co.*, 113 F. 2d 968 (C. A. 4th); *In re Gotham Can Co.*, 48 F. 2d 540 (C. A. 2d); *Mortgage Loan Co. v. Livingston*, 45 F. 2d 28, 34 (C. A. 8th);³ *People's Homestead Ass'n v. Bartlette*, 33 F. 2d 561 (C. A. 5th); *Phoenix Bldg. & Homestead Ass'n v. E. A. Carrere's Sons*, 33 F. 2d 563 (C. A. 5th); *San Antonio Loan & Trust Co. v. Booth*, 2 F. 2d 590 (C. A. 5th); *In re Bowen*, 46 Fed. Supp. 631 (E. D., Pa.); *In re Alpine Petroleum Corp.*, 41 Fed. Supp. 682 (E. D.,

³See, also, *Mortgage Loan Co. v. Livingston*, 78 F. 2d 517, 521 (C. A. 8th), certiorari denied, 296 U. S. 607.

N. Y.); *In re Chicago & N. W. Ry. Co.*, 35 Fed. Supp. 230, 254 (E. D., Ill.), affirmed 126 F. 2d 351 (C. A. 7th), certiorari denied 318 U. S. 793; *In re Fabacher*, 193 Fed. 556 (E. D., La.).⁴ Compare *Board of Com'rs of Sweetwater County, Wyo., v. Bernardin*, 74 F. 2d 809, 815 (C. A. 10th), certiorari denied 295 U. S. 731. Not only did the Supreme Court specifically hold, in affirming the decision of the Court of Appeals for the Eighth Circuit in *Coder v. Arts, supra*, that a secured creditor is entitled to interest until date of payment, but in *Louisville Bank v. Radford*, 295 U. S. 555, 597, it cited with approval some of the above decisions. Further, the right to post-bankruptcy interest on secured claims seems clearly to have been recognized by the Supreme Court in *Vanston Committee v. Green*, 329 U. S. 156, where the question was whether the secured creditors were entitled to interest on unpaid interest accruing after bankruptcy where the security was adequate to pay such interest on interest. See, also, *Georgia, Florida & Alabama R. Co. v. Bankers Trust Co.*, 170 F. 2d 733 (C. A. 5th), and *Delatour v. Prudence Realization Corp.*, 167 F. 2d 621 (C. A. 2d), affirming *In re Espade Realty Corp.*, 66 Fed. Supp. 683 (E. D., N. Y.). As the Court of Appeals for the Seventh Circuit

⁴In *United States v. Sampsell, supra*, this Court pointed out (p. 736) that there is some divergence of opinion as to whether post-bankruptcy interest is payable only to the date of sale of the security or to the date of payment of the secured claim, but it will be seen from the cases cited above that the weight of authority recognizes the right of the secured creditor to receive payment of the full amount of his claim, with interest to the date of payment.

said in *In re Chicago, R. I. & P. Ry. Co.*, *supra*, page 892:⁵

We think it has never been successfully contended in bankruptcy proceedings that a secured creditor is not entitled to interest accruing up to the time of payment to him, if the encumbered assets are sufficient to satisfy his entire claim. As has been suggested, any other result would lead to destruction of valid liens.

* * *

While this is an exception to the general rule that in bankruptcy proceedings interest on claims will be allowed only to the date of bankruptcy (*United States v. Sampsell*, *supra*), the reason for allowing post-bankruptcy interest on secured claims is made clear in the above decisions. A lien against the property of a bankrupt recognized as valid by either federal or state law attaches to the property in the hands of the trustee after bankruptcy, unless invalidated under some specific provision of the Bankruptcy Act. The trustee acquires no better title than the bankrupt had. He administers the bankrupt estate for the benefit of the general creditors, not for the benefit of the secured creditors. Before amendment by the so-called

⁵This case holds that when liens are of different dignity, claims of higher rank will be paid in full with interest during receivership, even though no assets are available to pay those of lower grade. The first report and account of the trustee in the instant case [Ex. I, p. 12, attached to motion to supplement record] reports payment of prior and secured claims and charges paid through escrow totaling \$35,150.96. Assuming these secured claims were entitled to priority over liens of the United States, the balance of the proceeds from the sale of the bankrupt's real property alone would be sufficient to pay the interest due the United States.

Chandler Act of 1938,⁶ Section 67 of the Bankruptcy Act⁷ specifically provided that liens given or accepted in good faith, and not in contemplation of or in fraud upon the provisions of the Act, and for a present consideration, should, to the extent of the present consideration, not be affected by anything in the Bankruptcy Act. See *In re Knox-Powell-Stockton Co.*, 100 F. 2d 979 (C. A. 9th). While this specific provision was deleted in the Chandler Act revisions, the principle is retained in Section 70 of the Act, as amended, when considered in connection with Section 67, as amended. (Appendix, *infra*.) *In re Van Winkle*, 49 Fed. Supp. 711, 713 (W. D., Ky.), and cases cited.

In this case the referee in bankruptcy found that the United States had valid and recorded liens prior to bankruptcy for, and was entitled to priority in payment of, certain unpaid excise, federal insurance contribution, and withholding taxes. [R. 8-9.]⁸ He allowed these claims, along with certain other tax claims for which the United States did not have liens, with interest at the statutory rate of six per cent⁹ to the date of bankruptcy on all claims

⁶Act of June 22, 1938, Chap. 575, 52 Stat. 840, Sec. 1 (11 U. S. C., 1946 Ed., Sec. 107).

⁷Chap. 541, 30 Stat. 544.

⁸See footnotes 1 and 2, *supra*.

⁹Interest on such unpaid taxes is imposed by Section 294 of the Internal Revenue Code, Appendix, *infra*, from the date the taxes are due until they are paid. See, also, Section 292 of the Code, Appendix, *infra*, relating to interest on deficiencies determined under Section 272 of the Code.

allowed, but denied the claim of the Government for interest to the date of payment on the taxes which were secured by liens prior to bankruptcy. [R. 20-25.] The District Court sustained his disallowance of post-bankruptcy interest on the Government's secured claims for taxes. [R. 34-35.]

In view of the settled law as we see it we find no basis for the decision of the referee and the court below in this case. The referee gave no reason for disallowing the Government's claim for post-bankruptcy interest on the taxes covered by liens, although he found the liens valid and held that the Government was entitled to priority. The District Court did not question the validity of the liens or the right of the Government to priority in payment. Its only observation with respect to post-bankruptcy interest on the secured tax claims in its "Order Remanding Review to Referee" [R. 34] was [R. 35]:¹⁰

Under the first question I hold with the referee. I do not consider the case of *Sampsell v. United States*, 153 F. 2d 731, applicable to the present situation. In the *Sampsell* case I was dealing with mortgaged property that was sufficient to pay the debt in full and to have held that the interest stopped upon an adjudication in bankruptcy would have destroyed the contractual lien rights of the mortgagee. I feel the first question is controlled by the case of *City of New York v. Saper, Trustee in Bankruptcy*, 336 U. S. 328.

It is not clear from this statement whether the court was of the opinion that a contractual lien has greater dignity

¹⁰Judge Ben Harrison also decided the *Sampsell* case in the District Court.

in a bankruptcy proceeding than a duly perfected and recorded statutory lien for unpaid taxes, or whether the decision was based upon an assumed limitation of funds in the estate subject to the tax liens of the United States. Neither proposition has any merit, we submit.

Any assumption that valid recorded statutory liens for federal taxes are of lesser dignity than a valid contractual lien cannot be supported by the authorities. If *New York v. Saper*, 336 U. S. 328, cited in the above statement, has any bearing whatever here it is authority to the contrary. The tax claims involved in that case, like some of the tax claims allowed in the instant case, were unsecured claims. They were not protected by valid recorded liens, as were the claims with which we are presently concerned, and the decision of the Supreme Court cannot be accepted as authority for the proposition that interest is not allowable beyond the date of bankruptcy on secured tax claims. On the other hand, the decision in that case is authority for the proposition that in a bankruptcy proceeding tax claims are to be treated on an equal basis with all other claims so far as the allowance of interest is concerned. After rejecting the long-established practice of allowing post-bankruptcy interest on tax claims against the bankrupt estate, the Supreme Court said of the Bankruptcy Act as it now stands (pp. 337-338):

The Court of Appeals concluded that by the 1926 amendment and the Chandler Act, Congress assimilated taxes to other debts for all purposes, including denial of post-bankruptcy interest. We think this is a sound and logical interpretation of the Act after these amendments to Sections 64(a) and 57(n). Considered in conjunction with the general rule against post-bankruptcy interest [citations] as well as Section 63's limitations of interest on other claims

to date of bankruptcy, they compel our conclusion, already stated, that the statute as amended did not contemplate any exception in favor of tax claims.

New York v. Saper, supra, dealt only with post-bankruptcy interest on unsecured claims. But if unsecured tax claims are to be "assimilated" to other unsecured claims for the purpose of allowing interest then there is no reason why secured tax claims should not be assimilated to other secured claims in determining whether post-bankruptcy interest should be allowed. We know of no authority to the contrary. Compare *Oppenheimer v. Oldham, supra*, p. 389.

That perfected liens of the United States for unpaid taxes are entitled to the same dignity in bankruptcy proceedings as contract liens is still further supported by the decision of the Supreme Court in *Goggin v. California Labor Div.*, 336 U. S. 118. A lien for federal taxes has all the dignity of a mortgage or other contractual lien. Before enactment of the Act of March 4, 1913, Ch. 166, 37 Stat. 1016, amending Section 3186 of the Revised Statutes, the rights of the United States under such liens were not even affected by the recordation laws of the states. See *United States v. Snyder*, 149 U. S. 210.

The provisions of Section 3186 of the Revised Statutes, as amended, are incorporated in Sections 3670 and 3671 of the Internal Revenue Code (Appendix, *infra*) under which the liens here arose. Section 3672 (Appendix, *infra*) (based on the Act of March 4, 1913, as amended) provides that liens of the United States for taxes shall not be valid as against a mortgagee, pledgee, purchaser, or judgment creditor unless notice of such lien is filed in accordance with the remaining provisions of that section.

In this case the referee found that the liens of the United States for the particular taxes involved in this appeal had been duly recorded in accordance with this latter section and that the United States was entitled to priority in payment of its lien claims. There is nothing in the record, the law, or applicable authorities which would warrant treating these liens, for purposes of the Bankruptcy Act, differently from any other lien perfected prior to bankruptcy.

If the decision below is allowed to stand it would seem to create an inequitable situation not found in other cases involving priority of liens. In other situations a valid recorded lien of the United States for taxes would take priority over a subsequent mortgage, judgment or other valid lien. The same would be true in a bankruptcy (*cf. In re Chicago, R. I. & P. Ry. Co., supra*, p. 892) except for the allowance of interest, but under the decision below the United States would receive interest only to the date of bankruptcy, although its lien was upon all the property of the bankrupt, while a subsequent mortgagee would receive payment of his claim in full, with interest, if the mortgaged property were sufficient.

Neither can the decision below, at least of the referee, be supported on the ground that the security covered by the liens of the United States was inadequate to pay the full amount of the taxes thus secured plus interest to the date of payment. At the time he entered his order of May 25, 1949, the referee had before him all of the records which are attached as exhibits to the affidavit of Eugene Harpole, special attorney for the Bureau of Internal Revenue, in support of the motion submitted to this Court on September 25, 1950, by the United States Attorney for leave to supplement the record on review in this case.

These documents clearly show that at the time the referee entered his order of May 25, 1949, he was fully advised of the fact that the proceeds from the sale of the real property of the bankrupt which he had held subject to the tax liens of the United States, without reference to all other property and rights to property which also was subject to the same tax liens,¹¹ were more than adequate to pay the secured claims of the United States with interest to the date of payment. Hence, it is only logical to assume that his denial of post-bankruptcy interest on the Government's secured tax claims was based upon some theory that tax liens are to be treated differently under the Bankruptcy Act from other valid liens. This, we believe, we have shown to be fallacious.

Also, it cannot be presumed that by its stipulation of facts relating specifically to the bankrupt's liability for taxes the United States precluded itself from relying upon facts already of record which would support its claim for post-bankruptcy interest. It would seem frivolous to stipulate facts already of record. Also, the stipulation specifically reserved to the parties the right to introduce any additional evidence not inconsistent with the stipulated facts. [R. 8.]

The failure of the referee to mention anything about the value of the security covered by the Government's liens in his certificate on review [R. 28-31] is further indication that his decision was not based on inadequacy of the security to pay the Government's claims in full.

As stated above, it is not clear from the "Order Remanding Review to Referee" [R. 34-35] whether the Dis-

¹¹See Section 3670 of the Internal Revenue Code.

strict Judge based his affirmance of the referee's decision upon a presumed insufficiency of the security covered by the Government liens to pay its claims in full with interest. The District Judge cannot be criticized for basing his conclusions upon the facts submitted to him by the referee's certificate. But since the referee's certificate made no mention of the security, either as to its adequacy or inadequacy to pay the interest which was the subject of his decision, and since such information was readily available to the District Judge if deemed controlling and could have been furnished by the referee on a supplemental certificate, it does not seem logical to assume that his affirmance of the referee's decision on this issue, even considering his reference to the decision in the *Sampsell* case, was based entirely upon inadequacy of the security to pay the Government's secured claims in full. Rather, since the question of adequacy of the security does not seem to have been raised, and in view of the reference to *New York v. Saper*, 336 U. S. 328, it would seem more logical to assume that the District Court intended to decide as a matter of law that the United States is not entitled to post-bankruptcy interest on its secured tax claims.

Also, it is doubtful if a demonstrated inadequacy of the security to pay a secured claim in full with interest is material at this stage of the proceeding. Whether a secured claimant is entitled to post-bankruptcy interest is essentially a question of law. Since a secured creditor is entitled to post-bankruptcy interest as a matter of law the question whether the award of the trustee in a particular case should include such interest depends primarily upon whether the security is sufficient to pay the secured claim in full. While in most of the decisions cited above the security was shown to be adequate to pay the secured

claims in full, that does not seem to have been the controlling consideration. Some of them do not show definitely that the security was adequate to pay the secured claim in full, and in *In re Bowen*, 46 Fed. Supp. 631, 640 (E. D., Pa.), the court held in advance of a determination of the amount available therefor that the secured claimant was entitled as a matter of law to payment of his claim in full with interest if funds therefor should eventually be adequate.

Because of the nature of the question here involved, and because of the equitable nature of bankruptcy proceedings and the piecemeal manner in which legal questions arising in such proceedings must be decided, we believe this Court can decide whether, as a matter of law, the United States is entitled to post-bankruptcy on its secured claims for unpaid taxes.¹² However, in view of the vagueness of the opinion of the District Court it was deemed advisable to request this Court to permit sufficient supplementation of the record on review to supply the necessary data with respect to adequacy of the security to pay the Government's secured claims in full with interest. While this procedure may be somewhat irregular, we submit this Court has the

¹²This specific question seems not to have been previously decided by any Court of Appeals, presumably because of the practice of allowing such interest prior to the decision of the Supreme Court in *New York v. Saper, supra*. However, the question has arisen in other bankruptcy proceedings. For instance, the referee in bankruptcy entered an order on October 13, 1949, allowing post-bankruptcy interest on tax lien claims of the United States in *In re Big Ben Motors, Inc.*, No. 46,124-Y (S. D. Cal.), and no review was sought; on March 31, 1950, Judge Hall entered a similar order in *In re Ridgcrest Development Co.*, No. 6354 (S. D. Cal.), and no appeal was taken; and on September 19, 1950, Referee Hugh L. Dickson, who decided the question in the instant case, entered an order allowing post-bankruptcy interest on tax lien claims of the United States.

power to grant the Government's motion to supplement the record, and if the additional evidence is material to a determination of the rights of the parties it ought in all equity to be granted.

While not of primary importance in determining the question here involved, it is to be noted that under Section 3670 of the Internal Revenue Code the tax liens of the United States attach to all of the property and rights to property of the taxpayer. Hence, the liens here involved attached not only to the real property of the bankrupt mentioned in the referee's order of August 9, 1946, but to all other property of the bankrupt, which the first report and account of the trustee¹³ shows also was adequate to pay the tax liens with interest to date of payment. But this fact is not emphasized, although it would have to be considered if the proceeds from the sale of real property were inadequate to pay the Government's claims in full, because it would require consideration of the further question whether the right of the Government to payment out of the proceeds of the sale of the bankrupt's personal property, not having been accompanied by possession, would be subject under Section 67(c) of the Bankruptcy Act, as amended, to prior payment of costs of administration and wage claims under Section 64(a) of that Act, as amended. (Appendix, *infra*.) Compare *Goggin v. California Labor Div.*, 336 U. S. 118.

¹³Exhibit I attached to the affidavit in support of the Government's motion to supplement the record herein.

Conclusion.

Under all of the circumstances we submit the decision of the District Court is wrong. It is contrary to the facts and the law and should be reversed.

Respectfully submitted,

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October, 1950.

APPENDIX.

Bankruptcy Act of 1898, c. 541, 30 Stat. 544 [as amended by the Act of June 22, 1938, c. 575, 52 Stat. 840, Sec. 1]:

SEC. 64. *Debts Which Have Priority.*—a. The debts to have priority, in advance of the payment of dividends to creditors, and to be paid in full out of bankrupt estates, and the order of payment, shall be (1) the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition; the filing fees paid by creditors in involuntary cases; where property of the bankrupt, transferred or concealed by him either before or after the filing of the petition, shall have been recovered for the benefit of the estate of the bankrupt by the efforts and at the cost and expense of one or more creditors, the reasonable costs and expenses of such recovery; the costs and expenses of administration, including the trustee's expenses in opposing the bankrupt's discharge, the fees and mileage payable to witnesses as now or hereafter provided by the laws of the United States, and one reasonable attorney's fee, for the professional services actually rendered, irrespective of the number of attorneys employed, to the petitioning creditors in involuntary cases and to the bankrupt in voluntary and involuntary cases, as the court may allow; (2) wages, not to exceed \$600 to each claimant, which have been earned within three months before the date of the commencement of the proceeding, due to workmen, servants, clerks, or traveling or city salesmen on salary or commission basis, whole or part time, whether or not selling exclusively for the bankrupt; * * *.

* * * * *

(11 U. S. C. 1946 ed., Sec. 104.)

SEC. 67. *Liens and Fraudulent Transfers.*— * * *

* * * * *

b. The provisions of section 60 of this Act to the contrary notwithstanding, statutory liens in favor of employees, contractors, mechanics, landlords, or other classes of persons, and statutory liens for taxes and debts owing to the United States or any State or subdivision thereof, created or recognized by the laws of the United States or of any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition in bankruptcy or of the original petition under chapter X, XI, XII, or XIII of this Act, by or against him. Where by such laws such liens are required to be perfected and arise but are not perfected before bankruptcy, they may nevertheless be valid, if perfected within the time permitted by and in accordance with the requirements of such laws, except that if such laws require the liens to be perfected by the seizure of property, they shall instead be perfected by filing notice thereof with the court.

c. Where not enforced by sale before the filing of a petition in bankruptcy or of an original petition under chapter X, XI, XII, or XIII of this Act, though valid under subdivision b of this section, statutory liens, including liens for taxes or debts owing to the United States or to any State or subdivision thereof, on personal property not accompanied by possession of such property, and liens whether statutory or not, of distress for rent shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act, and, except as against other liens, such liens for wages or for rent shall be restricted in the amount of their payment to the same extent as provided for wages and rent respectively in subdivision a of section 64 of this Act.

* * * * *

Internal Revenue Code:

SEC. 292. INTEREST ON DEFICIENCIES.

Interest upon the amount determined as a deficiency shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the collector, and shall be collected as a part of the tax, at the rate of 6 per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed, or, in the case of a waiver under section 272 (d), to the thirtieth day after the filing of such waiver or to the date the deficiency is assessed whichever is the earlier. (26 U. S. C. 1946 ed., Sec. 292.)

SEC. 294. ADDITIONS TO THE TAX IN CASE OF NONPAYMENT.

(a) *Tax Shown on Return.*—

(1) *General rule.*—Where the amount determined by the taxpayer as the tax imposed by this chapter, or any installment thereof, or any part of such amount or installment, is not paid on or before the date prescribed for its payment, there shall be collected as a part of the tax, interest upon such unpaid amount at the rate of 6 per centum per annum from the date prescribed for its payment until it is paid.

* * * * *

(26 U. S. C. 1946 ed., Sec. 294.)

SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or

addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. (26 U. S. C. 1946 ed., Sec. 3670.)

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time. (26 U. S. C. 1946 ed., Sec. 3671.)

SEC. 3672 [As amended by Section 401, Revenue Act of 1939, c. 247, 53 Stat. 862, and Section 505, Revenue Act of 1942, c. 619, 56 Stat. 798].
VALIDITY AGAINST MORTGAGEES, PLEDGEES,
PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under state or territorial laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

(2) *With clerk of district court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of

such notice in an office within the State or Territory; or

(3) *With clerk of district court of the United States for the District of Columbia.*—In the office of the clerk of the district court of the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

* * * * *

(26 U. S. C. 1946 ed., Sec. 3672.)

No. 12,578

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of the Estate of
Frank Rieber, Inc.,

Appellee.

Upon Appeal From the District Court of the United States
for the Southern District of California,

BRIEF FOR THE APPELLEE GEORGE T. GOGGIN.

BATES S. HIMES,

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Attorney for Appellee,

FILED

NOV - 1 1950

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No. 12,578

IN THE

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UNITED STATES OF AMERICA,

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vs.

GEORGE T. GOGGIN, Trustee in Bankruptcy of the Estate of
Frank Rieber, Inc.,

Appellee.

BRIEF FOR THE APPELLEE GEORGE T. GOGGIN.

Question Presented.

Appellant has correctly stated the question for determination. (B. 2.) For clarity and emphasis only will it be referred to herein. In a word, this Court is asked to determine whether interest on tax claims stops at date of bankruptcy, or whether it continues to date of payment.

Statement.

The Referee of the Bankruptcy Court below [R. 21], and the Judge of the District Court [R. 35], held that interest on tax claims stops at date of bankruptcy. Appellee believes the judgments of the lower tribunals are correct; and that the Supreme Court of the United States has decided the matter beyond further dispute. (*New York v. Saper*, 336 U. S. 328, 93 Law Ed. 710.)

Statutes Involved.

Appellant has referred to certain statutes. (B. 3.) Other statutes if deemed pertinent will be referred to in other parts of this brief.

Summary of Argument.

There is no authority in law for the imposition of interest on tax claims beyond the date of bankruptcy. Tax claims, whether secured by liens or not, are treated alike with respect to interest.

There is no authority in law for supplementing the record in a Court of appeal, to include matters not considered by the Court below.

ARGUMENT.

A. The Request by Appellant to Supplement the Record Is Without Merit.

One preliminary matter should perhaps be disposed of before entering into the argument on the main question. Appellant made a motion to supplement the record and that fact was referred to in its brief upon one or more occasions. (B. 4, 5, 6.) The matter was deferred by the Court following a hearing on September 25. (B. 6.)

For the reasons set forth in Appellee's Points and Authorities in opposition to the motion (on file in this proceeding), the motion should be denied and the matters sought to be included should be ignored. (See *Hcath v. Helmick* (1949), 173 F. 2d 156, cited in said Points and Authorities.)

The Appellant tacitly admits that its motion to supplement is of doubtful merit and says of the motion that it ". . . may be somewhat irregular. . . ." (B. 18.) The motion seeks to insert in the record matters not before the Referee, and not before the Judge of the District Court. for consideration at the time their decisions were made. The only true record before the lower tribunals were two written stipulations [R. 8 to 20] on factual matters.

B. The United States Is Not Entitled to Receive Interest on Its Tax Claims After Date of Bankruptcy.

The Appellant claims interest should be added to its tax claims, secured by liens, after date of bankruptcy and to date of payment. (B. 8.) Appellee contends that interest stops at the date of bankruptcy on any kind of a tax claim, including those secured, as here, by liens. Appellant attempts to argue that such tax claims should be treated as an exception to the general rule.

Appellant argues that in some cases ordinary secured creditors (holding mortgages) are entitled to interest to date of payment, and hence its tax claims should be similarly treated. (B. 8.) In a word, Appellant claims the lower Court erred in allowing interest only to the date of bankruptcy of the taxpayer.

Despite the earnestness of Appellant's arguments, it would appear that the Supreme Court of the United States has a rather different view of the matter. It has been held in a recent case that interest stops on tax claims at date of bankruptcy. (*New York v. Saper*, 336 U. S. 328 (1949), 93 Law Ed. 710.) The case appears to make no distinction between tax claims which are not secured by liens and those which are secured by liens. Nor does the case appear to apply to only one form of tax claim. It appears to apply the rule just stated to tax claims of every kind, and not alone to unsecured tax claims. A reading of the case would indicate that the Court has thoroughly explored the subject. The case does not appear to draw

a line between secured and unsecured tax claims. Also clear to us from reading the case is the conclusion that the Court apparently did not intend to make any exception in favor of so-called secured tax claims, or to distinguish between them and tax claims which are not so secured. This conclusion is heightened as one reads the case and finds no discussion on the particular subject as to whether the taxes in question are secured by liens or not. At least this writer can find no such discussion.

Nor does the *New York v. Saper* case above-cited ignore some of Appellant's arguments in the case at bar. The Appellant cites section 294 of the Internal Revenue Code, providing for payment of interest by a taxpayer to date of payment of the tax. (B. 11, 3—Appendix.) The Court in the *Saper* case noted at page 720, Law Edition, that the United States cites federal taxing statutes directing “. . . that upon non-payment of the tax there shall be added, as part of the tax, interest . . . to date of payment.” (Footnote 18.) Thus the Supreme Court had before it in the *New York v. Saper* case the same argument that is being advanced by Appellant here. And it seems doubtful that Appellant is now advancing anything that was not embraced within the matters considered in the *New York v. Saper* case.

The Court also noted in the *New York v. Saper* case that 40 years ago, Mr. Justice Holmes wrote for the Supreme Court that the rule stopping interest at bankruptcy had then been followed for more than a century and a half. (P. 330.) The rule decided by the Supreme

Court in the *New York v. Saper* case appears in head-notes one and two as follows:

“In the absence of statutory provisions to the contrary and as a principle of bankruptcy law, claims against a bankrupt bear interest until date of bankruptcy and not until payment.” (Note 1.)

“In accordance with general principles of bankruptcy law, a tax claim against a bankrupt bears interest until the date of bankruptcy, and not until payment, since the Bankruptcy Act contains no provision expressly repudiating the general principle or allowing an exception in favor of tax claims.” (Note 2.)

Wherefore, Appellee submits that the decision appealed from ought to be affirmed.

Respectfully submitted,

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United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant.

vs.

FRANK X. GRUBL,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

AUG 19 1910

WILLIAM P. O'BRIEN, JR.

No. 12579

United States
Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant.

vs.

FRANK X. GRUBL,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States District Court, Southern
District of California, Central Division

No. 10116-B

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK X. GRUBL, DOES I to X,
Defendants.

COMPLAINT FOR TREBLE DAMAGES
RESTITUTION AND INJUNCTION

I.

Plaintiff brings this action for restitution pursuant to Section 205(a) of the Emergency Price Control Act of 1942, as amended, and brings this action also for injunction, restitution and treble damages pursuant to Sections 205 and 206 of the Housing and Rent Act of 1947, as amended (Public Law 31, 81st Congress, 1st Session).

II.

Jurisdiction of this action is founded upon Section 205(c) of the Emergency Price Control Act of 1942, as amended, and Section 206 of said Housing and Rent Act of 1947, as amended.

III.

At all times mentioned herein prior to July 1, 1947, the housing accommodations located at 1130 Alpine Street, Los Angeles, California, (formerly 1125 Alpine Street, Los Angeles, California) have been subject to maximum rents authorized and

established pursuant to the Emergency Price Control Act of 1942, as amended. At all times mentioned herein on and after July 1, 1947, said housing accommodations have been subject to maximum rents authorized and in effect pursuant to said Housing and Rent Act of 1947, as amended. At all times mentioned in this complaint said premises have been within the Los Angeles Defense Rental Area.

IV.

That the Defendants Doe I to Doe X are the fictitious names of the defendants whose true names are to this plaintiff unknown, and plaintiff asks that when these true names are discovered this complaint may be amended by inserting such true names in the place and stead of such fictitious names. Wherever the word "defendant" is used in this complaint, it shall include all of the defendants individually and collectively herein sued.

V.

Defendant received from persons for the use and occupancy of said accommodations rents in excess of the maximum rents established pursuant to said Acts. A Schedule is attached hereto and by reference made a part hereof, as though fully set out herein. Said Schedule states the names of the persons using and occupying said accommodations, and the period of occupancy by such persons. Said Schedule states the rents charged to and received from said persons for such use and occu-

pancy during said period. Said Schedule states the applicable maximum rent. Said Schedule states the amount of the overcharges.

VI.

In the judgment of the Housing Expediter the defendant has engaged and is about to engage in acts and practices which constitute and will constitute violations of provisions of said Acts and of regulations, orders [3*] and requirements issued thereunder.

Wherefore, the plaintiff demands:

A. Judgment for the plaintiff to recover of the defendant treble the total amounts charged to persons, or demanded, accepted or received by the defendant from persons as rent for the use and occupancy of the housing accommodations described in this complaint, within one year prior to the filing of this complaint, which were in excess of the maximum rents established pursuant to said Housing and Rent Act of 1947, as amended, and further that:

B. The defendant be ordered and directed to pay to the Treasurer of the United States for and on behalf of all persons entitled thereto a refund of all amounts in excess of the maximum rents established pursuant to said Acts which were received by the defendant, his agents or employees since the date maximum rents were established for said housing accommodations pursuant to said Acts;

* Page numbering appearing at bottom of page of original certified Transcript of Record.

provided that refunds made by the defendant for and on behalf of such persons in compliance with the direction of the Court for rents received within one year prior to the bringing of this action, shall be deducted from the amount of the judgment prayed for in the preceding Paragraph "A"; or, in the alternative, that the defendant be ordered and directed to pay the amount of the overcharge referred to in this Paragraph "B" to the United States of America, and

C. A preliminary and final injunction enjoining the defendant, his agents, servants, employees, and all persons in active concert or participation with him, from:

1. Directly or indirectly charging, demanding, accepting or receiving amounts in excess of the maximum rent established pursuant to the afore-said Acts, and said Acts as hereafter amended or superseded and the regulations issued thereunder.

2. Directly or indirectly discontinuing, withholding, suspending or shutting off the supply of services, including utilities, heat, hot and cold [4] water, janitorial and maid service, furniture, furnishings, equipment, living space and all other services which the landlord is required to provide by said Acts and the regulations issued pursuant thereto, or threatening to do any of the foregoing with reference to the above-described housing accommodations or any other controlled housing ac-

commodations owned, managed or controlled by defendant.

3. Engaging in any action or cause of action the purpose of which is to evict illegally tenants from the above-described premises, or any other housing accommodations owned, controlled or managed by the defendant, and from evicting said tenants in any form or manner contrary to said Housing and Rent Act of 1947, as amended, and regulations issued pursuant thereto as heretofore or hereafter amended or superseded.

4. Violating said Housing and Rent Act of 1947, as amended, and any of the regulations issued pursuant thereto, as heretofore or hereafter amended or superseded.

D. Costs of the action incurred herein, and such other relief as the Court may deem just in the premises.

/s/ FAUSTA KUKURITIS,

Attorney,

Office of the Housing

Expediter. [5]

SCHEDULE REFERRED TO IN PARAGRAPH V OF PLAINTIFF'S FIRST CAUSE OF ACTION

Housing Accommodations Located at 1130 Alpine Street, Los Angeles, California
(Formerly 1125 Alpine Street, Los Angeles, California)

vs. Frank X. Grubl

7

Unit	Name of Tenant	Period of Overcharges	Amount Rent Paid	Maximum Rent	Amount of Over- charges
Rm. 11	Nicolas Ramirez	6- 6-49 to 7- 6-49	\$14.00 mo.	\$ 2.25 wk.	\$ 4.25
Rm. 13	Anna Dyrsmid	7- 1-47 to 7-31-48	12.00 mo.	10.00 mo.	26.00
Rm. 13	Anna Dyrsmid	8- 1-48 to 6-30-49	14.00 mo.	10.00 mo.	44.00
Rm. 17	Francis O'Donnell	1- 1-48 to 7-31-48	13.00 mo.	10.00 mo.	21.00
Rm. 17	Francis O'Donnell	8- 1-48 to 6-30-49	15.00 mo.	10.00 mo.	55.00
Rm. 18	Arthur De Young	8- 1-48 to 6-30-49	15.00 mo.	10.00 mo.	55.00
Rm. 19	Joseph Tucker	7- 1-47 to 7-31-48	13.00 mo.	12.00 mo.	13.00
Rm. 19	Joseph Tucker	8- 1-48 to 6-30-49	15.00 mo.	12.00 mo.	33.00
Rm. 24	Alexander Robertson	8- 1-48 to 6-30-49	14.00 mo.	12.00 mo.	22.00
Rm. 30	Harry Storm	7- 1-47 to 7-31-48	13.00 mo.	12.00 mo.	13.00
Rm. 30	Harry Storm	8- 1-48 to 6-30-49	15.00 mo.	12.00 mo.	33.00
Rm. 31	Oliver Kavern	7- 1-47 to 7-31-48	14.00 mo.	12.00 mo.	26.00
Rm. 31	Oliver Kavern	8- 1-48 to 6-30-49	15.00 mo.	12.00 mo.	33.00
Rm. 32	K. Okamoto	7- 1-48 to 6-30-49	16.00 mo.	12.00 mo.	48.00
Rm. 35	Arthur De Young	4- 1-48 to 7-31-48	12.00 mo.	10.00 mo.	8.00
Rm. 35	Arthur De Young	3-15-49 to 6-15-49	14.00 mo.	10.00 mo.	12.00
Rm. 36	Steve Bulich	1- 1-45 to 12-31-47	12.00 mo.	10.00 mo.	72.00
Rm. 36	Steve Bulich	1- 1-48 to 6-30-49	14.00 mo.	10.00 mo.	72.00
Apt. 4-5	J. A. Rademaker	4-17-49 to 7-17-49	24.00 mo.	15.00 mo.	27.00
Apt. 20-21	Louise M. Johnson	8- 1-48 to 6-30-49	35.00 mo.	25.00 mo.	110.00
Apt. 25-26	Amy E. Merrihew	12- 1-48 to 7-31-48	22.00 mo.	15.00 mo.	49.00
Apt. 25-26	Amy E. Merrihew	8- 1-48 to 6-30-49	24.00 mo.	15.00 mo.	99.00
Apt. 27-28	Rose Nagler	4- 1-48 to 6-30-49	24.00 mo.	20.00 mo.	60.00
Apt. 33-34	Helen Gray	8- 1-48 to 3-31-49	32.00 mo.	20.00 mo.	96.00

Total Amount of Overcharges.....\$1,031.25

[Endorsed] : Filed August 5, 1949.

[Title of District Court and Cause.]

ANSWER OF FRANK X. GRUBL

Comes Now Frank X. Grubl, and for answer to the complaint herein, denies, admits and alleges as follows:

I.

Denies the allegations contained in paragraph III of said complaint.

II.

Denies the allegations contained in paragraph V of said complaint.

III.

Denies the allegations contained in paragraph VI of said complaint.

For a First Affirmative Defense to the Said Complaint Defendant Alleges:

That the alleged overcharge of rent was not in fact collected by the defendant as rent but under an agreement with the persons shown in the schedule attached to said complaint for the agreed purpose of maintaining the premises as rental property after notice by the owners to defendant and tenants of defendant to vacate the property within 60 days after June 3, 1948. [8]

That said defendant by reason of the sale of the property to the Los Angeles Memorial Hospital, Inc., held the said premises on a month-to-month tenancy, which said property was not under control as to the owners, and under the circumstances the

tenants agreed to pay a sum equivalent to \$2.00 per room additional to their legal rent for the purpose of defraying the necessary expenses to retain their tenancies for such period as the owners might elect to give them. That defendant employed counsel, to negotiate with the owners to permit them to remain in occupancy after the 60 days had elapsed and said tenancy has up to the present time been retained upon a month-to-month tenancy by the said defendant to and for the benefit of the tenants whose names appear in the schedule attached to the said complaint. It is admitted by the defendant that under this agreement by the tenants, named in this complaint, he gave them receipts for the agreed \$2.00 to keep them in possession as long as possible, as rent, and that it is upon this evidence that the United States has commenced this suit against him. That prior to the institution of this action the said defendant filed with the Rent Expediter a signed statement by the tenants that they understood and agreed to the payment of the alleged overcharge for the purposes as above alleged. That no subterfuge or other illegal or indirect method was used by the defendant to overcharge the said tenants is manifest by the following affirmative defense.

For a Further and Additional Affirmative Defense,
This Answering Defendant Alleges:

I.

That defendant is informed and believes and upon such information and belief alleges that the

tenants shown on the schedule attached to the said complaint, upon receipt of the notices of overcharge from the plaintiff's office each individually endorsed upon such notice, a full and complete release of any claim against the said defendant Frank X. Grubl. They stated that there was an agreement to pay the amount above alleged for purposes other than rent, namely to retain their tenancy.

Wherefore, defendant prays that the complaint herein be dismissed.

/s/ ERNEST P. MORGAN,
Attorney for Defendant,
Frank X. Grubl.

Duly verified.

[Endorsed]: Filed September 6, 1949. [9]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial on the 19th day of January, 1950, before the Court, sitting without a jury, a jury having been waived, Asher Scheir, Esquire, appearing as counsel for plaintiff, and Ernest P. Morgan, Esquire, appearing as counsel for defendant Frank X. Grubl; the Court having heard the testimony and having examined the proof offered by the respective parties, and the cause having been submitted to the

Court for decision, and the Court being fully advised in the premises, now makes its Findings of Fact as follows: [18]

Findings of Fact

I.

That the allegations set forth in Paragraph II of the complaint on file herein are true.

II.

That the allegations of Paragraph III of the complaint are true.

III.

That the allegations contained in Paragraph V of the complaint are true; and the Court further finds that the amounts alleged as overcharges on the Schedule attached to the complaint are inconsequential.

IV.

That the allegations contained in Paragraph VI of the complaint are not true.

V.

That equity may best be served by denying the prayer of plaintiff's complaint.

Conclusions of Law

From the foregoing Findings of Fact the Court makes the following conclusions of law:

That jurisdiction of this action is founded on Section 205(c) of the Emergency Price Control

Act of 1942, as amended, and Section 2066 of the Housing and Rent Act of 1947, as amended.

That the housing accommodations located at 1130 Alpine Street, Los Angeles, California, are subject to maximum rents authorized and established pursuant to said Acts. [19]

That equity may be best served by denying the prayer of plaintiff's complaint and ordering judgment for defendant Frank X. Grubl.

Let judgment be entered accordingly.

Dated this 20th day of April, 1950.

/s/ HARRY C. WESTOVER,
District Judge.

[Endorsed]: Filed April 20, 1950. [20]

In the District Court of the United States, Southern
District of California, Central Division

No. 10116-HW

UNITED STATES OF AMERICA,
Plaintiff,

vs.

FRANK X. GRUBL, DOES I to X,
Defendants.

JUDGMENT

This matter came on regularly for trial the 19th day of January, 1950, before the Honorable Harry C. Westover, sitting without a jury, a jury having

been waived; Asher Scheir, appearing for plaintiff, and Ernest P. Morgan, appearing for defendant Frank X. Grubl, and evidence both oral and documentary having been adduced at the time of trial, and the Court being fully advised in the premises,

Finds that the overcharges complained of are inconsequential in amount and that equity will be best served by denying the prayer of plaintiff's complaint and ordering judgment for the defendant; it is therefore

Ordered, Adjudged and Decreed that judgment be and [21] is hereby ordered in favor of the defendant Frank X. Grubl.

Dated this 20th day of April, 1950.

/s/ HARRY C. WESTOVER,
District Judge.

[Endorsed]: Filed April 20, 1950.

Judgment entered Apr. 24, 1950. [22]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that United States of America, plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit, from the entire final Judgment entered in this action on the 24th day of April, 1950.

Dated: Los Angeles, California, this 2nd day of June, 1950.

ABE I. LEVY,

ASHER SCHEIR,

By /s/ ASHER SCHEIR,

Attorneys for Appellant,

United States of America.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 2, 1950. [23]

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF RECORD ON APPEAL

Appellant, United States of America, hereby designates the following portions of the record to be included in the record on appeal:

1. Complaint filed August 5, 1949.
2. Answer filed September 6, 1949.

3. Findings of Fact and Conclusions of Law by the Court filed April 20, 1950.

4. Final Judgment of the Court entered April 24, 1950, in Civil Order Book No. 65, Page 381.

5. Notice of Appeal dated June 2, 1950.

6. Statement of Points upon which Appellant Intends to Rely on Appeal.

7. This Designation.

Dated: Los Angeles, California, this 2nd day of June, 1950.

ABE I. LEVY,

ASHER SCHEIR,

By /s/ ASHER SCHEIR,

Attorneys for Appellant,

United States of America.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed June 2, 1950. [25]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 27, inclusive, contain the original Complaint; Answer; Memorandum of Opinion and Order for Judgment; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal;

Designation of Record on Appeal and Statement of Points on Appeal which constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 15th day of June, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12579. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Frank X. Grubl, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 16, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12579

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

vs.

FRANK X. GRUBL,

Defendant-Appellee.

STATEMENT OF POINTS RELIED ON

The following are the Points upon which the appellant intends to rely upon the appeal:

1. The Court erred in holding that the overcharges were inconsequential.

2. The Court erred in denying relief to the plaintiff on the ground that the overcharges were inconsequential.

3. The Court erred in failing to grant Judgment in favor of the plaintiff and to award restitution and injunctive relief as prayed for in the complaint.

Dated: Washington, D. C., this 6th day of July, 1950.

/s/ FRANCIS X. RILEY,

Attorney for Appellant,

United States of America.

[Endorsed]: Filed July 8, 1950.

[Title of Circuit Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD
TO BE PRINTED ON APPEAL

Appellant, United States of America, hereby designates the following portions of the record to be included in the record on appeal:

1. Complaint filed August 5, 1949.
2. Answer filed September 6, 1949.
3. Findings of Fact and Conclusions of Law by the Court filed April 20, 1950.
4. Final Judgment of the Court entered April 24, 1950, in Civil Order Book No. 65, Page 381.
5. Notice of Appeal dated June 2, 1950.
6. Statement of Points upon which Appellant Intends to Rely on Appeal.
7. Designation of Record in District Court.
8. This designation.

Dated: Washington, D. C., this 6th day of July, 1950.

/s/ FRANCIS X. RILEY,
Attorney for Appellant,
United States of America.

[Endorsed]: Filed July 8, 1950.

No. 12579

**In the United States Court of Appeals
for the Ninth Circuit**

UNITED STATES OF AMERICA, APPELLANT

v.

FRANK X. GRUBL, APPELLEE

**APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL
DIVISION**

BRIEF FOR APPELLANT

ED DUPREE,

General Counsel,

LEON J. LIBEU,

Assistant General Counsel,

FRANCIS X. RILEY,

Special Litigation Attorney,

Office of the Housing Expediter, Washington 25, D. C.

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In the United States Court of Appeals for the Ninth Circuit

No. 12579

UNITED STATES OF AMERICA, APPELLANT

v.

FRANK X. GRUBL, APPELLEE

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL
DIVISION*

STATEMENT OF JURISDICTION

The United States of America, plaintiff below, appeals from a final judgment of the United States District Court for the Southern District of California, Central Division, entered on April 20, 1950, in which a judgment was entered on behalf of the defendant-appellee herein on the ground that the "overcharges complained of are inconsequential in amount" (R. 13). Action was commenced pursuant to Section 205 (a) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. 901, et seq.) and Sections 205 and 206 (b) of the Housing and Rent Act of 1947, as amended (50 U. S. C. A. 1881, et seq.) (hereinafter referred to as the Act of 1942 and the Act of 1947, respectively), for an injunction, restitution and treble damages because of overcharges of rent collected contrary to the provisions of said Acts (R. 2).

Notice of Appeal was filed on June 2, 1950 (R. 14). Jurisdiction of this Court is invoked pursuant to Section 1291 of the Judicial Code (28 U. S. C. A. 1291).

STATEMENT OF THE CASE

On August 5, 1949, United States of America filed suit against the defendant for an injunction restraining violations of the Act of 1947 and for restitution pursuant to the Act of 1942 and for restitution and treble damages in accordance with Sections 205 and 206 (b) of the Act of 1947¹ (R. 2). In its complaint, the Government charged that the defendant was the landlord of premises located at 1130 Alpine Street, Los Angeles, California, located within the Los Angeles Defense-Rental Area and subject to the Federal rent control laws (Par. 3, R. 2). The Government further charged that the defendant received rents in excess of the legally established maximum rents as fully set forth in Schedule A of said Complaint (Par. 5, R. 3).² The plaintiff then prayed for a restraining order, restitution and damages (R. 4-6).

In his Answer, the defendant denied generally the material allegations of the Complaint (R. 8) and pleaded as an affirmative defense the fact that the excess amounts collected were collected pursuant to an independent contract and not as rent (R. 8). Defendant alleged that he had sold the property; that the tenants had been given notice to vacate; and that

¹ Sections 205 and 206 of the Act of 1947 are set forth in full, *infra*, pp. 12, 13.

² Schedule A is fully set forth in the record showing the number of the unit, the name of the tenant, the period of the overcharges, the maximum rent and the total amount of the overcharge (R. 7).

under the circumstances the tenants agreed to pay \$2.00 per room in addition to their legal rent for defraying expenses to retain their tenancies for such period as the new owners might elect to give them (R. 9). As a second and separate affirmative defense, the defendant pleaded "a full and complete release of any claim against the said defendant" signed by the tenants (R. 10).

The case was tried in the Court below without a jury, at the conclusion of which the Court entered Findings of Fact and Conclusions of Law (R. 10). In its Findings of Fact, the Court held that it had jurisdiction of the subject matter; that the defendant was a landlord of the accommodations in question, and subject to the Federal Rent Control Acts as controlled housing accommodations; that the allegations of Par. V of the Complaint are true, viz.: that defendant received from persons for the use and occupancy of said accommodations rents in excess of the maximum rents established pursuant to said Acts, as shown by Schedule A attached to the Complaint (Par. 3 of Findings, R. 11, Par. 5 of Complaint, R. 3); that the amounts set forth in said Schedule A "are inconsequential" (Par. 3 of Findings, R. 11); that the allegations contained in Par. VI of the Complaint are not true, viz.: that in the judgment of the Housing Expediter defendant has engaged in violations of the Act (Par. 4, R. 11); and last, that "equity may best be served by denying the prayer of plaintiff's Complaint" (Par. 5, R. 11). In its Conclusions of Law, the Court below concluded that "equity may best be served by denying the prayer of plaintiff's Complaint and ordering

judgment for defendant, Frank X. Grubl" (R. 12). Based upon these Findings and Conclusions, the Court entered a judgment holding the overcharges to be inconsequential and decreeing that equity could best be served by finding for the defendant, Frank X. Grubl (R. 12). From that judgment, plaintiff appeals (R. 14).

ARGUMENT

I

The Court below erred in denying relief to the plaintiff on the ground that the overcharges were inconsequential and in failing to grant statutory damages, an injunction and restitution for violations of the Acts of 1942 and 1947

In Par. III of its Findings the Court below found that the allegations contained in Par. V of the Complaint are true. This paragraph contained the allegation that defendant received from persons for the use and occupancy of housing accommodations rents in excess of the maximum rents established pursuant to said Acts as shown by Schedule A attached (R. 11).

Having found that defendant had received rents in excess of the maximum rents, it was incumbent upon the Court to grant judgment for an amount no less than single the amount of overcharges not barred by the statute of limitations under Sec. 205 of the 1947 Act, and if the overcharges were wilful to grant treble damages under said Act (*Porter v. Gray*, 158 F. 2d 442 (C. A. 9); *Fleming v. Hanscom*, 162 F. 2d 164 (C. A. 9); *Woods v. Haydell*, 178 F. 2d 914 (C. A. 5); *Porter v. Bledsoe*, 159 F. 2d 495 (C. A. 4); *Small v. Schultz*, 173 F. 2d 940, 943 (C. A. 7)). So, too, restitution should have been granted in

the exercise of the Court's sound discretion for that period of violation barred by the statute of violations (*Woods v. McCord*, 175 F. 2d 919 (C. A. 9); *Woods v. Witzke*, 174 F. 2d 855 (C. A. 6)).

The Court below, however, denied both statutory damages and restitution solely upon the ground that the overcharges were inconsequential. But this was an erroneous construction of the law since the doctrine *de minimis non curat lex* does not apply to actions brought by the United States for vindicating the public interest and preventing inflation. The doctrine *de minimis* particularly has no application to the suit brought by the Government in this case, first, because there was nothing *in fact de minimis* about these overcharges and, second, because it would defeat the Congressional purpose of curbing inflation and rental overcharges.

1. As to the first, the Complaint clearly shows that the amount involved in this action was \$1,031.25, which the Court found the defendant to have collected in excess of the legally established maximum rents (Par. 3—R. 11). Schedule A in great detail sets out the itemized overcharges totalling \$1,031.25 (R. 7). These overcharges range in amounts from \$110.00 overcharge to Louise M. Johnson to a one-month overcharge of \$4.25 to Nicolas Ramirez. An analysis of Schedule A shows that there were 24 overcharges. Of these 8 of them are in excess of \$50.00; 9 of them are in excess of \$25.00, for a total of illegal rent collections in excess of \$1,000. None of these overcharges is less than 20% of the maximum rent per month and some of them run more

than 50%. An overcharge of from 20% to 50% in excess rent for people living on the economic level of the people listed in Schedule A represents a very substantial item in living costs. It is true that taken by itself, an increase of \$2.00 per month per tenant may appear to be "inconsequential." But the policy of the Federal Government as expressed in the Act of Congress is to protect all levels of tenants. It is common knowledge that those in the lowest rent paying brackets are the least able to bargain for the scarce housing that exists today and are more easily the prey for unscrupulous landlords.

In order to uphold the conclusion of the Court below that these overcharges were *de minimis* one would necessarily remove from the protection of the Act persons at this economic level. Yet the contrary intention was explicitly expressed by Congress. In Section 205 of the Act of 1947, Congress provided that wherever the overcharges were less than \$50.00, the Court could award damages of \$50.00 or three times the amount of the overcharges, "*whichever was greater.*" [Emphasis added.] (See, *infra*, p. 12.) It was, therefore, very clearly within the contemplation of Congress that overcharges of the amounts which the Court below termed "inconsequential" were to be prevented and redressed.

2. Secondly, the doctrine *de minimis* cannot as a matter of law be applied to actions where the Housing Expediter in the name of the United States seeks to enforce compliance with the Act. (*Porter v. Rushing*, 157 F. 2d 263 (C. A. 8); *Porter v. McRae*, 155 F. 2d 213 (C. A. 10); *Brown v. Mars*, 135 F. 2d 843,

849 (footnote 3) (C. A. 8th), cert. denied, *sub nomine Mars v. Bowles*, 320 U. S. 798; *Bowles v. Ormesher*, 65 F. Supp. 791 (D. C. Neb.); *Creedon v. Stratton*, 74 F. Supp. 170, 180 (D. C. Neb.).)

In the *Rushing* case, *supra*, the District Court in its opinion (65 F. Supp. 759) pointed out that there were two violations; one involving \$12.00 and the second, involving \$2.00. The Court without a hearing on the merits dismissed the complaint stating "the maximum *de minimis non curat lex* * * * require(s) that the complaint be dismissed" (p. 760). In reversing the District Court, and returning the case "for trial on the merits," the Court of Appeals said:

"* * * The judgment was entered on the ground that the maxim *de minimis non curat lex* and the fair and honest administration of the law required the dismissal. Since the courts are not vested with discretion either to deny enforcement of or to withhold the statutory remedies provided by Congress, *Lenroot v. Interstate Bakeries Corp.*, 8 Cir., 146 F. 2d 325; *Porter v. McRae*, 10 Cir., 155 F. 2d 213, the case should not have been dismissed. * * *

Cf. *Bowles v. American Stores*, 139 F. 2d 377 (App. D. C.) where a single sale at only a few cents above the legal maximum was involved.

Judge Delehant had occasion to point out how disastrous the application of the *de minimis* theory would be upon price and rent control in *Bowles v. Ormesher*, *supra*. In that case, he forcefully said (65 F. Supp. at p. 793):

Finally, it is said that the facts alleged are trifles; and “*de minimis non curat lex.*” The point is devoid of merit. The violations charged are trifles only in the sense that the impairment of a building’s joists by one day’s toil of a single termite is trifling. The cumulative burrowings of that insect and his brethren over a measurable period of time destroy the entire structure. Isolated, the alleged evasion of the Price Control Act by the defendant, however censurable in its implications, would, indeed, be trivial. But it may not be appraised in isolation. It and an infinite number of comparable transgressions, continued, enlarged, and practiced over a substantial territorial area, must inevitably result in ruinous inflation and economic disorder. And there is nothing minimal either in that consequence or in the smallest act of unreckoning selfishness that contributes to it even remotely. *Qui patriae pericula plorat, de minimis non clamat.*

3. It is true that in addition to finding that defendant received rental overcharges as set out in Schedule A (Finding III, R. 11), the Court below also found that Allegation VI of the Complaint was not true viz: “In the judgment of the Housing Expediter the defendant has engaged or is about to engage in acts and practices which constitute and will constitute violations of * * * said Acts * * *” (Finding VI, R. 4).

At most Finding VI is no more than a conclusion of law wholly unsupported in the record. Indeed, as we have seen, the Court’s finding of Fact III that violation was present to the extent set forth in Sched-

ule A is squarely opposed to the conclusion of law set forth in Finding IV.

Moreover, if we consider Finding IV literally, it declares that it is not true that in the judgment of the Housing Expediter the defendant has engaged in violation. But the judgment of the Housing Expediter must have been that overcharges were received by defendant as shown by the filing of suit by him. That there was ample basis for the Expediter's judgment is found in Fact Finding III (R. 11) that defendant received "rents in excess of the maximum rents." For these reasons, Finding IV (R. 11) must be set aside as being manifestly erroneous.

4. Defendant in his answer also relied upon the voluntary agreement of the tenants to pay the overcharges.³ Obviously, this defense was also lacking in merit since agreements to pay more than the rental allowed by law are void as against public policy.

The Courts have repeatedly held that where a statutory proscription is placed upon one party, he may not plead the collusion of a third party in

³ This defense, of course, is contrary to the express provisions of Sec. 4 (a) of the 1942 Act and Sec. 206 (a) of the 1947 Act (*Infra*, pp. 12, 13) as well as Sec. 2 of the Rent Regulation for Rooming Houses (12 F. R. 4302; 13 F. R. 1873) to which these premises were subject. Section 2 of that Regulation (See, *infra*, p. 14) provides in part that "regardless of any contract * * * no person shall demand or receive any rent * * * higher than the maximum rents provided by this Regulation * * *." This Court has previously pointed out the lack of the bargaining position which a purchaser or a tenant has in a war affected economy. (*Martini et al. v. Porter*, 157 F. 2d 35 (C. A. 9), cert. denied 330 U. S. 848; see too, *Woods v. Schmid*, 164 F. 2d 981 (C. A. 5); *Woods v. Dodge*, 170 F. 2d 761 (C. A. 1)).

justification for violation of the statutory edict (*Popplewell v. Stevenson*, 176 F. 2d 362 (C. A. 10); *N. L. R. B. v. American Potash and Chemical Corp.*, 118 F. 2d 630, 631 (C. A. 9); *Ebeling v. Woods*, 175 F. 2d 242 (C. A. 8)). In rejecting the argument that the tenant was in *pari delicto* with his landlord as a defense to an action for restitution under Section 205 (a) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. 925 (a)), the Court in the *Ebeling* case said (p. 245):

Appellant's final contention is that the court should have denied restitution under the doctrine of *pari delicto*. The argument is that it was as wrong for the tenant to pay the \$500 bonus as it was for the landlord to accept it, and that the Administrator therefore ought not to be permitted to seek a restitution for the tenant's benefit. But this ignores both the concept underlying the Act and its plain provisions. Under 50 U. S. C. A. Appendix, § 904 (a), the duty to avoid overcharges under the Act is the responsibility of the landlord and not the tenant. The landlord alone, because of his superior position generally in the housing-shortage situation was made the offender under the Act. Congress regarded a tenant, who paid more than the authorized rental for a housing accommodation, as having committed no wrong.

See, also, *Porter v. Crawford and Doherty Foundry Co.*, 154 F. 2d 431, 433 (C. A. 9).

On the basis of the foregoing authorities and the necessity that the intent of the Congress be enforced, it is respectfully submitted that the Court below erred

in denying relief to the Government and in finding for the defendant on the ground that the transgressions were "inconsequential".

CONCLUSION

It is respectfully submitted that the Court below erred in failing to enter judgment for the plaintiff and that the judgment below be reversed with directions to enter a judgment as prayed in the Complaint.

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FRANCIS X. RILEY,

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Office of the Housing Expediter,

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APPENDIX

(1) Emergency Price Control Act of 1942, as amended (50 U. S. C. A. 901, et seq.):

PROHIBITIONS

SEC. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing.

(2) Housing and Rent Act of 1947 (50 U. S. C. A. 1881, et seq.):

RECOVERY OF DAMAGES BY TENANTS

SEC. 205. Any person who demands, accepts, or receives any payment of rent in excess of the maximum rent prescribed under section 204 shall be liable to the person from whom he demands, accepts, or receives such payment, for reasonable attorney's fees and costs as determined by the court, plus liquidated damages in the amount of (1) \$50, or (2) three times the amount by which the payment or payments demanded, accepted, or received exceed the maximum rent which could lawfully be demanded, accepted, or received, whichever

in either case may be the greater amount: *Provided*, That the amount of such liquidated damages shall be the amount of the overcharge or overcharges if the defendant proves that the violation was neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. Suit to recover such amount may be brought in any Federal, State, or Territorial court of competent jurisdiction within one year after the date of such violation. For the purpose of determining the amount of liquidated damages to be awarded to the plaintiff in an action brought under this section, all violations alleged in such action which were committed by the defendant with respect to the plaintiff prior to the bringing of action shall be deemed to constitute one violation, and the amount demanded, accepted, or received in connection with such one violation shall be deemed to be the aggregate amount demanded, accepted, or received in connection with all violations. A judgment in an action under this section shall be a bar to a recovery under this section in any other action against the same defendant on account of any violation with respect to the same plaintiff prior to the institution of the action in which such judgment was rendered.

PROHIBITION AND ENFORCEMENT

SEC. 206. (a) It shall be unlawful for any person to offer, solicit, demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent prescribed under section 204.

SEC. 206 (b). Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of subsection (a) of this section, he may make application to any Federal, State or Territorial

court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such subsection, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

(3) Rent Regulation for Rooming Houses (12 F. R. 4302; 13 F. R. 1873):

SEC. 2. *Prohibition*—(a) *Prohibition against higher than maximum rents.* Regardless of any contract, agreement, lease or other obligation heretofore or hereafter entered into, no person shall offer, demand, or receive any rent for or in connection with the use or occupancy on and after July 1, 1947, of any room subject to this regulation, within the defense-rental area, higher than the maximum rents provided by this regulation; and no person shall solicit, attempt, or agree to do any of the foregoing. A reduction in the minimum space, services, furniture, furnishings or equipment required under section 3 of this regulation shall constitute an acceptance of rent higher than the maximum rent. Lower rents than those provided by this regulation may be demanded or received.

No. 12583

IN THE
United States
Court of Appeals
FOR THE NINTH CIRCUIT

KENNETH R. HASTINGS and
LYLE McDANIEL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE SAM M. DRIVER, *Judge*

BRIEF OF APPELLEE

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HONORABLE SAM M. DRIVER, *Judge*

BRIEF OF APPELLEE

JURISDICTION

Jurisdiction of this Court to consider the appeal
in this cause is set out on Pages 1, 2 and 3 of the
Appellants' brief.

STATEMENT OF THE CASE

Appellants were indicted and tried in the Northern Division of the Western District of Washington for violation of Sections 2729 and 3261, Title 26, U.S.C., and sentenced to serve two years each. The indictment is set out on Page 1 of the Transcript of Record and charges in effect that the appellants were in possession of a double-barrelled, sawed-off shotgun without having registered the possession of the same with the Collector of Internal Revenue as required by law.

The evidence developed by the Government showed that the appellants were found in possession of a double-barrelled shotgun, the barrels of which were less than thirteen inches in length. At the time the appellants were apprehended they were in a vehicle headed north away from the City of Seattle on Highway 99 in the direction of Everett, Washington. The evidence further revealed that the appellants had not registered possession of the firearm with the Collector of Internal Revenue.

QUESTIONS RAISED

There are three questions presented in this appeal:

1. Can the appellants in an appeal from an

order denying a petition to vacate judgment, based on Section 2255, Title 28, U.S.C., raise questions for review by this Court involving questions of fact and law which should have been raised by an appeal from the conviction?

2. Assuming, but not conceding, that the first question is answered in the affirmative, is the operation of Sections 2729 and 3261, Title 26, U.S.C., suspended during the hours which the office of the Collector of Internal Revenue is closed?

3. Assuming, but not conceding, that the first question is answered in the affirmative, is there a duty upon the appellants to register the possession of a firearm in accordance with Section 3261, Title 26, U.S.C., when they cut off the barrels of a shotgun themselves.

SPECIFICATION OF ERROR

Specification of error upon which the appellants rely is set out on Page 6 of the appellants' brief.

ARGUMENT

1. THE QUESTIONS RAISED IN APPELLANTS' PETITION TO VACATE JUDGMENT CONCERNING QUESTIONS OF LAW AND FACT SHOULD HAVE BEEN RAISED ON AN APPEAL FROM THEIR CONVICTION AND CANNOT NOW BE RAISED ON AN APPEAL FROM AN ORDER DENYING A PETITION TO VACATE JUDGMENT.

The original petition of the appellants as set out on Pages 7 to 11 of the Transcript of Record states that the petitioners were convicted for a violation of Section 902(f), Title 15, U.S.C. Although the appellants had previously been convicted of robbery from a person by violence and were on conditional release from McNeil Island at the time the offense in this case occurred, the appellants were not charged with violation of Section 902(f), Title 15, U.S.C., but were charged with violating the provisions of Sections 2729 and 3261, Title 26, U.S.C. Therefore, the statements in the original petition, with regards to transportation of a firearm in interstate commerce, are immaterial and should not be considered in this appeal.

The other two points raised in the original pe-

tition to vacate judgments and sentences and the supplement thereto are first, that the appellants did not cut off the barrels of the shotgun until 4:30 P. M. on Friday, April 15, 1949, and, therefore, there was no duty to register the firearm until the office of the Collector of Internal Revenue or the Alcohol Tax Unit opened on Monday morning, and second, that there is no duty to register possession of the sawed-off shotgun when the possessors themselves cut the barrel off.

It is the Appellee's contention that both of these are questions of law and fact which must be raised on an appeal from the conviction. The time for such an appeal had long since expired when notice of appeal was filed in this cause. The judgments and sentences were entered on June 16, 1949. Notice of appeal in this matter was filed April 25, 1950.

Section 2255, Title 28, U.S.C., gives to a person in custody the right to make a collateral attack on the judgment of conviction by way of motion or petition to the Court which sentenced him. This statute in effect takes the place of what has heretofore been known as a writ of coram nobis.

This Court in the case of *Audette vs. United States*, 99 Fed. (2d) 113, held that questions which should be raised on appeal cannot be considered in

an application for a writ coram nobis. The appellants in this case should not be permitted to raise questions in a petition based upon Section 2255, Title 28, U.S.C., which could not be raised heretofore in a writ coram nobis.

This identical question was ruled upon in the Fourth Circuit in *Howell vs. United States*, 172 Fed. (2d) 213 wherein the decision states:

"It is elementary that neither habeas corpus nor motion in the nature of application for writ of error coram nobis can be availed of in lieu of writ of error or appeal, to correct errors committed in the course of a trial, even though such errors relate to constitutional rights. It is only when there has been the denial of the substance of a fair trial that the validity of the proceedings may be thus collaterally attacked or questioned by motion in the nature of petition for writ of error coram nobis or under 28 U.S.C.A. 2255."

In *Taylor v. United States*, 177 Fed. (2d) 194, the Court of Appeals for the Fourth Circuit again ruled upon this question in the following language:

"Prisoners adjudged guilty of crime should understand that 28 U.S.C.A. Sec. 2255 does not give them the right to try over again the cases in which they have been adjudged guilty. Questions as to the sufficiency of the evidence or involving errors either of law or of fact must be raised by timely appeal from the sentence if the petitioner desires to raise them. Only where the sentence is void or otherwise subject to collateral

attack may the attack be made by motion under 28 U.S.C.A. Sec. 2255, which was enacted to take the place of habeas corpus in such cases and was intended to confer no broader right of attack than might have been made in its absence by habeas corpus."

2. THE OPERATION OF THE STATUTE REQUIRING FIREARMS TO BE REGISTERED IS NOT SUSPENDED DURING THE HOURS WHEN THE OFFICE FOR REGISTRATION IS CLOSED.

Although the appellee firmly believes that the questions raised by the appellants in this appeal cannot properly be considered by this Court in reviewing an order denying petition to vacate judgments under the provisions of Section 2255, Title 28, U.S.C.A., the appellee will herein answer the arguments of appellants.

Since the Government has no right of appeal in criminal cases, it is unlikely that questions similar to those raised by the appellants here would ever be presented to an Appellate Court. In the absence of a ruling upon such questions as these by an Appellate Court, it is conceivable that some other defendants might persuade a trial judge to adopt the theories presented by the appellants here. If such were to happen and the jury was so instructed, and

the defendants acquitted, this Court would never have an opportunity to correct the error in view of the fact the Government has no right to appeal.

Section 2729, Title 26, U.S.C., states in effect that "any person who violates or fails to comply with any of the requirements" of Section 3261 shall be punished. Section 3261 states in effect that every person possessing a firearm shall register the same. Neither of these statutes require any intent. Therefore, the appellants' argument to the effect that the Government must prove that the appellants did not register the firearm is of no avail.

The statute as passed by congress makes it an offense to have possession of a firearm without having registered the same. The appellants contend that the evidence showed that the barrel of the shotgun was not cut off and made a firearm within the definition of Section 2733, Title 26, U.S.C., until after 4:30 on the afternoon of Friday, April 15, 1949, and that, therefore, there was no duty to register the firearm until the proper offices for registration opened on Monday morning. The appellants base their contention upon impossibility of performance. The appellee contends that this argument is untenable. In the first place there was nothing to compel the

appellants to cut off the barrel at any time, except perhaps their own desire to use the sawed-off shotgun in some crime of violence. A sawed-off shotgun is only good for one purpose and that is killing human beings. The only logical conclusion that can be drawn from appellants' act of cutting off the shotgun is that they intended to use it for such purpose. The obvious purpose of Congress in passing the acts here involved was to keep such weapons out of the hands of hoodlums.

If the appellants' contention is a legal defense to the crime charged in the indictment, the same theory would apply to all statutes requiring a license to be issued, or registration to be perfected, before the doing of some act. For instance, anyone could practice law without a license claiming that no examination for the bar had been given since the time he started to practice. Anyone could fish on Sunday without a license claiming that there was no office open where they could obtain such license at the time they wanted to fish. An operator of a motor vehicle would not have to have a driver's license if he only drove during the hours when the office for issuing such license was closed.

The same argument which is presented in the appellants' brief was also presented to the Court

and jury at the time of the trial of this cause. Even if the appellants' theory were a valid defense, it is a matter of fact which the jury alone could decide. The appellants' brief is based upon the assumption that the only evidence as to the time when the barrels of the shotgun were cut off is fixed at 4:30. This is based upon the testimony of Frances L. Lewis as set out on Pages 58 through 62 of the Transcript of Testimony. That witness testified that the shotgun had thirty-inch barrels at 4:30 on Friday afternoon, April 15, 1949. The inference, of course, which the appellants seek to draw from this testimony is that it is proof that the barrels of the shotgun were not cut off at thirteen inches until after the offices of the Collector of Internal Revenue and Alcohol Tax Unit were closed for the weekend.

The appellants, however, failed to take into consideration conflicting testimony as set out in the statements of the appellants introduced in evidence as Exhibits 2 and 3. They are quoted on Pages 55 through 57 of the Transcript of Testimony. In Exhibit 2, the statement of Lyle McDaniel, he states that about 1:30 in the afternoon Hastings asked him "to drive to his friend's house", presumably the house of Frances L. Lewis, to pick up the shotgun. McDaniel goes on to state that it was about 2:00 when

he parked in front of the friend's house, and that thereafter the appellants cut off the barrels.

In the signed statement of Kenneth R. Hastings he confirms the time of 1:30 in the afternoon as set out in the statement of McDaniel.

It will thus be seen that there is a direct conflict in the signed statements of the appellants and the oral testimony of Frances L. Lewis and, therefore, was within the providence of the jury to determine how soon after 2 P. M. the barrels of the shotgun were cut off. There was ample evidence for the jury to find that the barrels were cut off prior to 4:30 on the afternoon of April 15, 1949. The appellee contends, therefore, that even if this Court should adopt the theory of the appellants, the evidence in the case presents a question of fact which the jury has decided against the appellants and this Court should not upset the jury's finding when the same was based upon ample evidence.

It should also be pointed out that neither of the appellants testified before the jury. If Exhibits 2 and 3 were in error as to the time when the shotgun was procured from the home of a friend, the appellants had every opportunity to take the stand and correct such error. Having elected to forego their right to testify in their own behalf, the appellants

cannot now contend that their signed statements were not correct. The time at which the barrels were cut off is peculiarly within the knowledge of the appellants.

The appellants seek comfort in comparing the sentence in the letter of Judge Driver set out on Page 16 of the Transcript of Record, "I think that the crux of the offense is possession of an unregistered firearm", with the language used in *Crapo vs. United States*, 100 Fed. (2d), 996, which states:

"The gist of the offense charged in count 1 is the possession of the firearm and the failure to register the same."

The appellee contends that for all practical purposes the statement of Judge Driver in his letter and the above quotation from the Crapo case are identical and no error can be inferred therefrom.

3. THEIR ACT OF CUTTING OFF THE BARRELS OF A SHOTGUN SO THAT THEIR LENGTH IS THEREAFTER THIRTEEN INCHES IS AN ACT OF ACQUIRING A FIREARM AND SUCH IS NOT IN CONFORMITY WITH THE ACTS OF CONGRESS.

The second question raised in the appellants' appeal is also one which was considered by the Court and the jury at the time of the trial and as such is

not a question which can be raised on an appeal from an order denying ^{petitioner} ~~judgment~~ under the provisions of Section 2255, Title 28, U.S.C.

Upon the second question presented in the appellants' brief, it is argued that since the shotgun as originally acquired by the appellants had a thirty-inch barrel and they thereafter cut off the barrel to thirteen inches that they had acquired the sawed-off shotgun in conformity with the law.

Section 3261(b), Title 26, U.S.C., reads as follows:

"Every person possessing a firearm shall register with the collector of the district in which he resides, the number or other mark identifying such firearm, together with his name, address, place where such firearm is usually kept, and place of business or employment, and, if such person is other than a natural person, the name and home address of an executive officer thereof: *Provided*, That no person shall be required to register under this subsection with respect to any firearm acquired after July 26, 1934, and in conformity with the provisions of this part and subchapter B of chapter 25."

It is clear from the plain reading of this statute that every person must register the possession of a firearm unless the circumstances fall within the exception thereto. The exception, which is set out in the words following the word "provided" in the stat-

ute, relieves the possessor of a firearm from registering if (1) The firearm was acquired after July 26, 1934, and (2) acquired in conformity with the provisions of Sections 2720 through 2733, Title 26, U.S.C. Both elements of the proviso must be present in order for the exception to apply. If congress had intended otherwise the conjunction "and" would not have been used but the word "or" would have been used in drafting the legislation. Therefore, unless the firearm came into the appellants' possession after July 26, 1934 and in accordance with the provisions of Sections 2720 to 2733, Title 26, U.S.C., the appellants have violated the law. If they acquired the firearm before July 26, 1934 it must be registered in any event.

By some reasoning, not explained in the appellants' brief, it is argued that the act of cutting off the barrels of a shotgun is acquiring a firearm in accordance with the provisions of Sections 2720 to 2733. A careful reading of these sections reveals that they provide a method whereby firearms may be manufactured, imported, dealt in and transferred in a lawful manner. It logically follows that any method of acquiring a firearm not in accordance with the provisions of the above mentioned sections renders

the possessor thereof guilty of violating Section 3261(b) unless he registered the same.

It will be noted from reading Sections 2720 through 2733, Title 26, U.S.C., that those sections provide a method of registration of firearms which render the need for registration in accordance with Section 3261(b) unnecessary.

The sections mentioned provide a method for the lawful transfer, manufacture, importation, etc. of firearms and for the collection of the tax imposed thereon. When these sections have been complied with, the purpose of Section 3261(b) which is an aid of taxation has already been accomplished.

This Court in effect has stated this premise in the following language of the decision in *Fleish v. Johnston*, 145 Fed. (2d) 16:

"It is evident that the statute requires every firearm to be registered. The registration involves a complete identification of each individual firearm as well as a statement concerning its present possessor and whereabouts. A record of the latter statement without the identification of the weapon itself obviously would fail to satisfy the terms of the act. The crime defined by the statute is the failure to register a specific firearm in one's possession, not the failure to indicate generally that one possesses firearms. Cf. the statute in *People v. Puppilo*, 100 Cal. App. 559, 280 P. 545. Therefore, the nonregis-

tration of any one firearm in one's possession constitutes a complete offense separate and distinct from the nonregistration of any other such firearm."

In the case of *United States v. Penn*, 115 Fed. (2d) 672, the appellant was convicted for having a sawed-off shotgun in his possession without having complied with the requirements of the Internal Revenue Code. The facts of the case as reported in the decision reveal that the gun had belonged to the appellant's brother who occupied the premises before his death some years prior to the appellant's arrest. The decision then goes on to state:

"Defendant did not deny that the gun had been in the closet during his occupancy of the premises for a period of about three years and that he had used the closet. Consequently, the evidence was ample to support the charge that the defendant had the gun in his possession. The evidence establishes that the defendant did not comply with the provisions of the Internal Revenue Code, and in fact the defendant does not contend that he did."

The appellants in the Penn case acquired possession of a sawed-off shotgun in a manner other than that provided in Section 2720 through 2733, yet the Court did not consider the appellants relieved of the duty to register the possession of the firearm. It should also be pointed out that the appellant in the Penn case apparently did nothing of his own volition to acquire

the possession of the sawed-off shotgun other than to take over the premises of his brother, while in the case at hand, the appellants actively sought possession of a sawed-off shotgun by cutting off the barrels themselves.

A learned explanation of the validity of Section 3261(b) and the reasons for its existence set out in the decision in *United States v. Cumbee*, 84 Fed. Supp. 390, from which the following quotation is taken:

“Section 3261 applies to all persons who possess guns which were not obtained in conformity with the statute. That is, it requires information on firearms concerning which the Government does not possess information already, but which may give rise to the statute’s tax applicability on transfers or dealerships. In some instances, Section 3261 may be the means by which additional dealers subject to the tax can be discovered. For obviously, some persons might obtain firearms other than in conformity to the statute and thereby aid in avoiding the tax which would be required and collected if the possession was known and the dealership thereby revealed.”

CONCLUSION

The appellee having respectfully shown to this Court that the matters raised on the appeal are not questions which can be considered on a motion to vacate judgment and, further, that there is no merit in the appellants' contentions that the operation of the statute involved are suspended during hours when the offices for registration are closed, and that the sawing off of the barrel of a shotgun relieves the possessor thereof of the duty of registering, it is requested that this Court affirm the order entered by the Honorable Sam M. Driver on April 17, 1950.

Respectfully submitted,

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No. 12586

United States
Court of Appeals
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OSCAR ANDERSON and ALASKA FISHER-
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Appellants,

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Transcript of Record

Appeal from the District Court
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FILED
AUG 31 1950

PAUL P. O'BRIEN,
CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

WILLIAM L. PAUL, JR.,

Juneau, Alaska,

Attorney for Appellants

J. GERALD WILLIAMS,

Territorial Attorney General,

JOHN DIMOND,

Assistant Territorial Attorney General,

Juneau, Alaska,

Attorneys for Appellees.

In the District Court for the Territory of Alaska
1st Division

No. 6102-A

OSCAR ANDERSON and ALASKA FISHER-
MEN'S UNION and Labor Union Acting on
Behalf of Certain of Its Members,
Plaintiff,

vs.

TERRITORY OF ALASKA,
Defendant.

COMPLAINT

Plaintiffs complain and for their cause of action,
allege:

I.

That at all times herein mentioned the defendant, Territory of Alaska, is a part of the United States of America, and has been granted certain powers and rights under an act or acts of Congress of the United States of America.

II.

That at all times herein mentioned the plaintiff, Alaska Fishermen's Union, is a labor union chartered by the International Fishermen and Allied Workers of America, affiliated with the Congress of Industrial Organizations, and is maintaining this proceeding for the benefit of its members who are classified as fishermen and who are classed as non-residents, and who live principally within the states of Oregon, Washington and California, and who are employed by fish-packing companies who oper-

ate fish-packing canneries within the Territory of Alaska in the various fishing areas, and who employ fishermen in fishing with gill nets, trap fishermen, crews of tenders, and other floating equipment used in handling of fish in the Territory of Alaska. That plaintiff union at all times herein mentioned has been and still is and for an indefinite future time will be the duly authorized and established bargaining agent for all of said nonresident fishermen, with respect to the terms and conditions of their employment, and particularly with respect [115*] to all of the matters and things that are the subject matter of this complaint. Plaintiff, Oscar Anderson, is the Secretary-Treasurer for said plaintiff union, with the authority, and has the full authority of said union to handle all business of the union and its members with respect to all the matters and things that are the subject matter of this complaint. That said union represents approximately four thousand nonresident fishermen who fish in Alaska each fishing season, and two thousand resident fishermen who fish in the Territory of Alaska during each fishing season.

III.

During the past several years all fishermen fishing in Alaska during each fishing season have been assessed a license tax by the Territory of Alaska, as follows:

Resident fishermen paying a \$1.00 license tax,
and nonresident fishermen paying \$25.00
license tax.

That defendant, Territory of Alaska, during the 1948 Legislative Session sponsored legislation to increase the license fees of nonresident fishermen from \$25.00 per year to \$50.00 per year for each fisherman who was not a resident of the Territory of Alaska, and also provided that resident fishermen who were residents of Alaska would pay the license fee of \$5.00 per year. That this act increasing the license fee of nonresident fishermen from \$25.00 per year to \$50.00 per year was enacted by the Legislature of the Territory of Alaska, and approved by the Governor of said territory on the 21st day of March, 1949. True and correct copies of said purported statute enacted by the legislature are attached hereto, marked Exhibit A, and incorporated herein by this reference.

IV.

As applied to said plaintiff and members of said plaintiff union, who fish in Alaska during each fishing season, said [116] purported statute violates the Fourteenth Amendment of the Constitution of the United States, because it discriminates against non-residents of the Territory of Alaska who have equal rights with residents in fishing within the Territory of Alaska. That said purported statute also is in violation of Section Nine of the Organic Act, providing that all taxes shall be uniform upon the same class of subjects. Said purported statute also violates Article 3, Section 2, of the Constitution of the United States, because it is an unwarranted invasion of the Admiralty and Maritime

Jurisdiction of the United States as applied to said plaintiff union and its members, does and will prejudice and adversely affect the uniformity and consistency of the general maritime law as it is applied to fishermen. As so applied, said statute violates Article I, Section 8, of the Constitution of the United States, in that it places an undue burden on interstate and foreign commerce. That plaintiff union and its members have no adequate remedy at law, and will be irreparably injured unless defendant is enjoined and restrained of demanding and collecting said license tax of \$50.00 from each nonresident fisherman; and unless defendant is so enjoined and restrained, there will be a multiplicity of suits to recover the amounts paid over and above \$25.00 license tax, which has been the license tax for many years past, and which is the license tax which is applicable to the resident fishermen. The amount in controversy in this action exceeds the sum of \$3,000.00, exclusive of interest and costs.

Wherefore, plaintiffs pray that this court issue an order restraining defendant until further order of this court from demanding and collecting from any nonresident fisherman the sum of \$50.00, license tax, in purported reliance upon said act of the legislature of the Territory of Alaska, [117] pertaining to license taxes for fishermen; and plaintiffs further pray for judgment and decree of this court declaring said act of the Legislature unconstitutional and invalid insofar as said act purports to authorize and require the payment of \$50.00

license fee by nonresident members who go to the territory each fishing season to fish for fish packing companies, and restraining the defendant herein from making said collection of said \$50.00 license fee from any nonresident fisherman in purported reliance upon said statute of the Territory of Alaska. Plaintiff further prays for such other and further relief as to the court may appear just in this cause.

R. E. JACKSON,

WILLIAM L. PAUL, JR.,
Attorney for Plaintiffs.

State of Washington,
County of King—ss.

Oscar Anderson, being first duly sworn on oath, deposes and says:

That he is Secretary-Treasurer for the plaintiff in the above-entitled action and makes this verification for and on its behalf; that he has read the foregoing Complaint, knows the contents thereof, and believes the same to be true.

OSCAR ANDERSON.

Subscribed and sworn to before me this 23rd day of May, 1949.

[Seal]

R. E. JACKSON,

Notary Public in and for the State of Washington.

[Endorsed]: Filed May 26, 1949. [118]

[Title of District Court and Cause.]

AMENDMENTS BY INTERLINEATION

Pursuant to leave of court, plaintiff hereby amends the complaint as follows:

I.

M. P. Mullaney is Commissioner of Taxation of the Territory of Alaska.

WILLIAM L. PAUL, JR.,
Plaintiff's Attorney.

Receipt of copy acknowledged.

[Endorsed]: Filed March 21, 1950. [119]

[Title of District Court and Cause.]

AMENDED ANSWER

Defendant, the Territory of Alaska, by its attorneys, after leave of court first had and obtained, files this its Amended Answer to the Complaint on file herein, answering as follows, to wit:

First Defense

(1) Defendant admits the allegations contained in Paragraph I of plaintiff's complaint.

(2) Referring to Paragraph II of plaintiff's complaint, defendant alleges that it does not have sufficient information to form an opinion as to the

truth or falsity of the allegations contained therein, and, therefore, denies the same upon that ground.

(3) Referring to Paragraph III of plaintiff's complaint, defendant denies the allegations contained in the first sentence thereof in respect to the allegation that all fishermen fishing in Alaska have been assessed a license tax by the Territory of Alaska; and defendant alleges that only certain fishermen fishing in Alaska have during the past several years been assessed a license tax by the Territory of Alaska. Defendant admits the allegations contained in the second, third and fourth sentences of Paragraph III of plaintiff's complaint.

(4) Defendant denies each and every material allegation contained in Paragraph IV of plaintiff's complaint.

Second Defense

For a second and separate defense to the Complaint defendant alleges that the \$50.00 license fee imposed upon nonresident fishermen under Chapter 66, Session Laws of Alaska, 1949, does not constitute an invalid discrimination against such nonresident fishermen because

(1) The Territorial Commissioner of Taxation and his deputies are placed to additional burden and expense in the matter of collecting license taxes levied under said Chapter 66 from nonresident fishermen as compared with the collection from resident fishermen.

(2) Under various laws enacted by both the Territory and its municipalities for the protection of the health and safety, and for the promotion of the welfare of the general public in Alaska, such as Territorial laws relating to the welfare and protection of wage earners of Alaska, the Territorial Workmen's Compensation Act, laws enacted for the purpose of protecting public health, and police protection offered by both the Territory and its municipalities, the nonresident fishermen in Alaska are not discriminated against but receive benefits under such laws on an equality with resident fishermen. However, considering the tax scheme of the Territory and the relatively short period of time that nonresident fishermen are in the Territory, the nonresident fishermen in Alaska do not contribute as large an amount to the expense of execution and administration of such laws as do the resident fishermen.

(3) Giving consideration to the benefits and protection received by nonresident fishermen from Territorial and municipal laws, and to the relatively brief periods of time [121] during which substantial earnings are made by average fishermen from fishing in Alaska, the \$50.00 fee imposed on nonresident fishermen is entirely reasonable and not excessive.

Wherefore, defendant having fully answered the

Complaint filed herein, prays that plaintiff take naught by reason thereof and that the same be dismissed with prejudice.

J. GERALD WILLIAMS,
Attorney General of Alaska.

JOHN H. DIMOND,
Assistant Attorney General,
Attorneys for Defendant.

Copy Received.

[Endorsed]: Filed Jan. 27, 1950. [122]

[Title of District Court and Cause.]

STIPULATED NOTES OF JANUARY 19, 1950, PERPETUATED TESTIMONY

Testimony of Carl Wiedeman

Lives at Juneau—gave figures on trolling in Southeastern Alaska 1941 through 1949:

Date	Gross Earnings	Expenses	Net Earnings
1941—4 mos.	\$2,801.00	\$ 750.00	\$2,061.00
1942—5 mos.	3,862.00	1,266.00	2,614.00
1943—5 mos.	4,021.00	1,627.00	2,394.00
1945—4½ mos.	4,221.00	1,494.00	2,727.00
1946—5 mos.	4,971.00	2,596.05	2,373.78
1947—5 mos.	3,710.00	1,976.41	1,833.59
1948	4,978.63	2,171.00	2,807.63
1949	4,126.80	1,861.00	2,265.80

Trolling operations were usually 4½ to 5 months. Expenses of operation included gas and oil, repairs on boat and engine—in the past 5 years de-

ductions for food have been made—also included is gear replacements. No depreciation has been charged. The value of the boat owned by Wiedeman is \$6,000. He figures that he has worked 14 hours daily while trolling and made an average net earnings of \$2,384.48 yearly.

Testimony of Paul Ecklund

Lives at Thane—gave figures on trolling for the past three years in Southeastern Alaska, 1947 through 1949:

Date	Gross Earnings	Expenses	Net Earnings
1947—5 mos.	\$5,521.00		\$2,234.70
1948	7,533.41		4,075.72
1949	6,729.27		4,295.00

Expenses include \$420.00 yearly depreciation on hull and \$740.00 yearly depreciation on engine—the cost of boat was \$4,200.00. He believes that resident and nonresident trolling boats are about the same with perhaps the nonresident boats being a little larger. He fished off Yakobi Island inside the three-mile limit mostly, icing his fish and bringing them into Pelican at periodic intervals. [123]

Testimony of Christofer Nelson

A gillnetter from Bristol Bay, worked at APA Diamond J., testified as to his earnings in 1947-8-9. The Company, meaning employer, pays resident fisherman's fare from home to fishing grounds and return. Nineteen and a half actual fishing days included in about two months' work, amount to

one-third resident and two-thirds resident fishermen at Diamond J.

Date	Gross Earnings
1947.....	\$3,487.98
1948.....	2,511.00
1949.....	1,413.00

Testimony of Chris McNeil

A resident of Juneau—a Bristol Bay gillnet fisherman since 1946 for APA Diamond J. This witness believes he was over average in 1947. In 1948 and 1949 in halibut fishing, he fished in Area II all over Lynn Canal, and in 1949 all over Icy Strait as well. In 1949 at seining he fished all over Icy Strait.

Date	Gross Earnings
1947.....	\$3,100.00
1948.....	2,517.32 \$1,208.89 Halibut Area II
1949.....	1,318.74 Bristol Bay, \$2,623.48 Icy Strait Seining, \$1,021.47 Hali- but Area

Testimony of George Lane

A resident of Juneau, has been a gillnet fisherman for the last 17 years—mostly at APA Koggiung Diamond J. This witness testified that for the past three years the average catch in Bristol Bay of residents and nonresidents was about the same, although the tendency is for nonresidents to be a little higher because only highliners are hired. This witness testified that he fished all over Bristol Bay, although he did not get down as far as the blinker about 80 miles below the Naknek

River. He did get as far as Point Etolin about 70 miles below on the North Side of Bristol Bay.

Date	Gross Earnings
1946.....	\$3,104.13
1947.....	5,246.16
1948.....	3,104.13
1949.....	2,419.20 Bristol Bay; \$2,900.00 seining

Testimony of Bill Bigelow

A resident of Wrangell, has been a seiner since 1936; gave testimony of earnings at seining from 1943 through 1949. This witness testified that from 1943 through 1947 the salmon seining season was from about July 5 to September 3, with extra time spent before and after the season getting the boat ready. For the past two years he has fished at APA Koggiung, in addition to salmon seining, and believes that he was about average at salmon seining.

Date	Share	No. of Shares Earned	Gross Earnings
1943	\$ 737.00	5 shares	\$ 3,685.00
1944	2,464.24	5 shares	12,321.20
1945	739.15	3¼ shares	2,412.28
1946	(not seining)		
1947	737.00	3½ shares	2,579.50
1948	743.00	3½ shares	
	2,639.26 Bristol Bay		5,054.01
1949	2,944.00	2¾ shares	
	1,434.00 Bristol Bay		9,530.00

TESTIMONY OF FRED SOBERG

A resident of Juneau—a troller for past three years—prior to that he had worked in Bristol Bay as a gillnetter for CPRA, Scandinavian Cannery, and for Wingard at Ugashik. He stated that in Bristol Bay the averages for the residents were

lower. The nonresident average at a particular cannery was consistently larger, although as between canneries the lead of the nonresidents varied, depending upon the attitude of the superintendent to favor residents or nonresidents and select better fishermen thereby. He believes that from his experience in trolling the nonresident boats are larger and better equipped. At trolling in Southeastern Alaska he reported to some station about once weekly, these stations being Pelican and Elfin Cove. He owns his own boat which is 29 feet long and is powered by a 42 h.p. motor and usually trolls about 4 months a year. [125]

In the District Court for the Territory of Alaska
Division Number One at Juneau
No. 6102-A

OSCAR ANDERSON and ALASKA FISHER-
MEN'S UNION,

Plaintiff,

vs.

M. P. MULLANEY,

Defendant.

OPINION

Appearances:

WM. L. PAUL, JR.,

R. E. JACKSON,

Attorneys for Plaintiffs.

J. GERALD WILLIAMS,

Attorney General of Alaska,

JOHN H. DIMOND,

Assistant Attorney General,

For Defendant.

By Chapter 66, SLA, 1949, the Territorial Legislature increased the license taxes on resident fishermen from \$1 to \$5 and on nonresident fishermen from \$25 to \$50. The \$25 tax, imposed in 1933 when the purchasing power of a dollar was more than double what it now is, was sustained in *Anderson v. Smith*, 71 F(2), 493.

Plaintiffs seek to restrain the enforcement of this act, so far as it applies to nonresident fishermen, on the grounds that:

(1) It contravenes the 14th Amendment in that it discriminates against nonresidents;

(2) That it conflicts with the provision of Section 9 of the Organic Act, 37 Stat. 512, 48 USCA, 78, requiring uniformity of taxation on the same class of subjects.

(3) That it encroaches on the admiralty jurisdiction, thereby substantially affecting its uniformity, and

(4) Burdens interstate commerce in violation of Article 1, Section 8, of the Constitution.

Since the third contention is disposed of adversely to [126] plaintiff by *Alaska Steamship Company v. Mullaney*, decided March 1, 1950, by the Court of Appeals for the 9th circuit, and *Just v. Chambers*, 312 U. S. 383, 392; and it is well set-

tled that a tax of this kind is not a burden on interstate commerce because the taxable event—the taking of the fish—occurs before the fish have entered the flow of commerce, *Toomer v. Witsell*, 334, U. S. 385, 394, and that the uniformity provision of the Organic Act does not apply to license taxes, *Alaska Fish Saltery & By-Products Co.*, 255 U. S. 44, these contentions will not be discussed.

So far as the remaining contention that the tax violates the 14th Amendment is concerned, the question differs in form only from that presented in *Martinsen v. Mullaney*, 85 F. S. 76. In that case this court held that in the absence of evidence of the existence of a rational basis for classification, the tax of \$50 on nonresident fishermen was invalid under the Civil Rights Act. In the instant case the defendant has introduced evidence showing the earnings of nonresident fishermen and the difficulty and expense of collecting the tax from them, detecting evasions and apprehending violators. Briefly, the evidence shows that thousands of non-residents come to Alaska each year and engage in fishing for salmon during the fishing season, which varies from 20 days in Bristol Bay to 2 months elsewhere, during which time they enjoy the protection of the local government; that among them are hundreds of trollers who come to the Territory in their power boats, roaming far and wide along the 26,000 miles of coastline; and that since they own no property and are not required by the shipping laws to enter or clear upon arrival in or departure from the Territory and, moreover, warn

each other by radiophone of the proximity or presence of the tax collector, the difficulties of detection, apprehension [127] and collection during the short fishing season are well nigh insuperable. Moreover, the evidence shows that evasion does not end with apprehension, for often there is a claim of local residence, the verification of which can not be undertaken until the pursuit of evaders ends with the close of the fishing season, when, upon discovery of the falsity of the claim, the violator is invariably out of the jurisdiction of the Territory. It is not surprising, therefore, that the testimony shows that 90% of the cost of collecting the taxes under Chapter 66 is incurred in collecting or attempting to collect the nonresident tax.

The evidence further shows that the net annual earnings of trollers for a season of 4 to 5 months average approximately \$3500; of gill netters in Bristol Bay approximately \$2500 for a season of 20 days, while the average earnings of those employed on cannery tenders and traps are approximately \$1500 and \$2000, respectively.

I am of the opinion, therefore, that the classification of fishermen into residents and nonresidents rests on substantial differences bearing a fair and reasonable relation to the object of the legislation, within the doctrine of *Royster Guano Co. v. Virginia*, 253, U. S. 412, 415; *Louisville Gas & Electric Co. v. Coleman*, 277 U. S. 32, 37. Indeed, administrative inconvenience and expense in the collection of a tax may themselves afford sufficient basis for such a classification. *Carmichael v. South-*

ern Coal Co., 301 U. S. 495, 512; Madden v. Kentucky, 309 U. S. 83, 89, 90. Likewise the encouragement of settlement and preferment of local enterprise would appear to be sufficient under Haavik v. Alaska Packers' Assn., 263 U. S. 510, 515; Welch v. Henry, 305 U. S. 134, 146; New York Rapid Transit v. New York, 303 U. S. 573, 580. And the court will take judicial notice of [128] the national policy implicit in many recent legislative and administrative measures designed to accomplish these ends.

Accordingly, I conclude that the tax is valid and that the complaint should be dismissed.

GEORGE W. FOLTA,
District Judge.

[Endorsed]: Filed March 21, 1950. [129]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for hearing on the 16th day of March, 1950, on the complaint and amended complaint of plaintiffs and the answer and amended answer of the defendant to the complaint. Plaintiffs were represented by their counsel, William L. Paul, Jr., of Juneau, Alaska, and R. E. Jackson of Seattle, Washington; defendant was represented by J. Gerald Williams, Attorney General of Alaska, and John H. Dimond, Assistant Attorney General. Evidence having been

adduced before the court on behalf of plaintiffs and defendant and the cause having been submitted for judgment on March 16, 1950, and the court having taken the matter under advisement on that date, and having thereafter on the 21st day of March, 1950, rendered its written opinion, which was on that date filed with the Clerk of the Court, now, upon the evidence adduced, the court does make the following:

Findings of Fact

1. Plaintiff, Alaska Fishermen's Union, is a labor union chartered by the International Fishermen and Allied Workers of America, affiliated with the Congress of Industrial Organizations. Plaintiff, Oscar Anderson, is the Secretary-Treasurer for said plaintiff union, with authority to handle all business of the union and its [130] members.

2. Defendant is an officer of the Territory of Alaska, and has been and now is the Commissioner of Taxation for the Territory of Alaska, authorized by law to collect taxes for the Territory of Alaska and to enforce the tax laws of the Territory.

3. This action arises under the Act of March 21, 1949, designated as Chapter 66, Session Laws of Alaska, 1949.

4. Plaintiff labor union maintained this action for the benefit of its members who are classified as fishermen and who are classed as nonresidents, and who live principally within the States of Oregon, Washington and California, and who are employed

by fish packing companies who operate fish packing canneries within the Territory of Alaska in the various fishing areas, and who employ fishermen in fishing with gill nets, trap fishermen, crews of tenders and other floating equipment used in the handling of fish in the Territory of Alaska. Plaintiff union has been and now is the duly authorized and established bargaining agent for all of said nonresident fishermen, with respect to the terms and conditions of their employment.

5. Said union represents approximately three thousand two hundred (3,200) nonresident fishermen who fish in Alaska each fishing season, and two thousand (2,000) resident fishermen who fish in Alaska each fishing season.

6. Thousands of nonresident fishermen come to Alaska each year and engage in fishing for salmon during the fishing season, which varies from twenty days in Bristol Bay to two months elsewhere. Said nonresident fishermen come to the Territory shortly before the fishing season and depart therefrom immediately after the close of [131] the fishing season. Said nonresidents own no property in the Territory, and are not required by shipping laws to enter or clear upon arrival in or departure from the Territory. During the time said nonresidents are within the Territory, they enjoy the protection of local government.

7. Defendant and his deputies have detected evidence indicating large scale evasions of payment of the fishermen's license tax by nonresident fish-

ermen. In order to enforce collection of this tax from the nonresident fishermen, defendant found it necessary to send an enforcement officer each year throughout the various fishing areas located along the 26,000 miles of Alaska coastline. The difficulties encountered by defendant and his deputies in the collection of license taxes from nonresident fishermen and the detection and apprehension of those who evade payment of this tax are almost insuperable.

8. Little difficulty is encountered by defendant and his deputies in the collection of the license tax from resident fishermen. There are few attempts at evasion by this class of fishermen, and since resident fishermen are within the jurisdiction of the Territory after the close of the fishing season, the detection and apprehension of those who do evade payment of the tax is not difficult.

9. It is much more difficult and expensive to collect the license tax from nonresident fishermen than it is from resident fishermen. Approximately 90% of the cost of collecting the fishermen's license taxes is incurred in collecting or attempting to collect said taxes from nonresident fishermen.

10. The net annual earnings of trollers for a season of four or five months average approximately \$3,500.00; [132] of gill netters in Bristol Bay approximately \$2,500.00 for a season of twenty days; and the average earnings of those employed on cannery tenders and traps are approximately \$1,500.00 and \$2,000.00, respectively.

Based upon the foregoing findings of fact, the court makes the following:

Conclusions of Law

I.

Chapter 66, Session Laws of Alaska, 1949, does not contravene the Fourteenth Amendment to the Constitution, the Civil Rights Act, or the Organic Act of Alaska; does not encroach upon the admiralty jurisdiction of the United States or affect its substantial uniformity; and does not burden interstate commerce in violation of Article 1, Section 8, of the Constitution.

II.

The classification of fishermen into residents and nonresidents as contained in Chapter 66 is valid because it rests on substantial differences bearing a fair and reasonable relation to the object of the legislation.

III.

The \$50.00 license fee imposed on nonresident fishermen under Chapter 66, is reasonable and not excessive.

IV.

Chapter 66 is a valid Act, and the complaint and amended complaint should be dismissed.

Plaintiffs' Exceptions are hereby allowed.

Costs will be allowed defendant.

Done in Open Court at Anchorage, Alaska, this
18th day of April, 1950.

GEORGE W. FOLTA,
District Judge.

Approved as to form and copy received April 15,
1950.

WM. L. PAUL, JR.,
Attorney for Plaintiffs.

[Endorsed]: Filed April 20, 1950. [133]

In the District Court for the Territory of Alaska
Division Number One at Juneau
No. 6102-A

OSCAR ANDERSON and ALASKA FISHER-
MENS' UNION,

Plaintiff,

vs.

M. P. MULLANEY, Commissioner of Taxation of
the Territory of Alaska,

Defendant.

JUDGMENT AND DECREE

The above-entitled cause came on regularly for
hearing on the 16th day of March, 1950, on the
complaint and amended complaint of plaintiffs and
the answer and amended answer of the defendant
to the complaint. Plaintiffs were represented by
their counsel, William L. Paul, Jr., of Juneau,
Alaska, and R. E. Jackson of Seattle, Washington;
defendant was represented by J. Gerald Williams,

Attorney General of Alaska, and John H. Dimond, Assistant Attorney General. Evidence having been adduced before the court on behalf of plaintiffs and defendant and the cause having been submitted for judgment on March 16, 1950, and the court having taken the matter under advisement on that date, and having thereafter on the 21st day of March, 1950, rendered its written opinion, which was on that date filed with the Clerk of the Court; and the court being fully advised in the premises and having heretofore made and ordered entered its findings of fact and conclusions of law; now therefore, it is hereby

Ordered, Adjudged and Decreed that Chapter 66, Session Laws of Alaska, 1949, is a valid Act; and it is further

Ordered, Adjudged and Decreed that the complaint and amended complaint filed herein be, and the same hereby are [134] dismissed; and it is further

Ordered, Adjudged and Decreed that defendant recover from plaintiffs defendant's costs in this action incurred in the amount of \$. . . ., to be taxed by the Clerk of Court.

Plaintiffs' exceptions are hereby allowed.

Done in Open Court at Anchorage, Alaska, this 18th day of April, 1950.

GEORGE W. FOLTA,
District Judge.

Receipt of Copy acknowledged.

[Endorsed]: Filed April 20, 1950. [135]

[Title of District Court and Cause.]

NOTICE OF GENERAL APPEAL

To the Clerk of the above Court:

Please Take Notice that Oscar Anderson and Alaska Fishermen's Union, plaintiffs in the above-entitled cause, hereby appeal to the United States Court of Appeal for the Ninth Circuit from a judgment and decree of the above court entered herein on the 18th day of April, 1950, and from each and every part of said judgment and decree.

Dated this 8th day of May, 1950.

WILLIAM L. PAUL, JR.,

ROY E. JACKSON,

CARL B. LUCKERETH,

Attorneys for Plaintiffs.

[Endorsed]: Filed May 15, 1950. [136]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men by These Presents; That Oscar Anderson and Alaska Fishermen's Union as principals, and the American Surety Company of New York, a corporation duly organized and existing under and by virtue of the laws of the State of New York, as surety, are held and firmly bound unto M. P. Mullaney, Commissioner of Taxation

of the Territory of Alaska, defendant above named, in the sum of Two Hundred Fifty Dollars (\$250.00), to be paid to the said M. P. Mullaney, Commissioner of Taxation of the Territory of Alaska, defendant, heirs or assigns, for the payment of which, well and truly to be made, we hereby bind ourselves, our, and each of our, heirs, executors, administrators, successors in interest, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 8th day of May, 1950, at Seattle, Washington.

The condition of the foregoing obligation is such that:

Whereas, the above-named plaintiffs have taken appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment rendered in said cause in the District Court for the Territory of Alaska, First Division, on the day of May, 1950, and the Cost Bond has been duly fixed in the sum of Two Hundred Fifty Dollars (\$250.00).

Now, Therefore, if the above-named plaintiffs shall prosecute said appeal to effect and answer all costs that may be adjudged against them in case they fail to make good their appeal, then this obligation shall be void, otherwise to be and remain in full force, virtue and effect.

In Witness Whereof, said principals have hereunto set their hands and seals, and the American Surety Company of New York has caused this

bond to be executed and sealed with its corporate seal by and through its duly authorized attorney in fact, on the day and year first hereinabove written. [137]

ALASKA FISHERMEN'S
UNION,

By OSCAR ANDERSON,
Principal.

AMERICAN SURETY COM-
PANY OF NEW YORK,
Surety.

[Seal] By J. A. HOBSON,
Resident Vice President.

[Endorsed]: Filed May 15, 1950. [138]

[Title of District Court and Cause.]

DESIGNATIONS OF PORTIONS
OF THE RECORD

To the Clerk of the District Court for the Territory of Alaska, Division No. 1, at Juneau:

You are hereby requested to prepare, certify, and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit, at San Francisco, with reference to the notice of appeal heretofore filed by plaintiffs-appellants in the above cause, transcript of the record in said cause, prepared and transmitted as required by law and by rules of

said court, and to include in said transcript of record the following documents, or certified copies thereof, to wit:

1. Complaint.
2. Amendments by interlineation.
3. Amended Answer.
4. Reporter's Transcript of Testimony.
5. Stipulated Notes of January 19, 1950, Perpetuated Testimony.
6. Opinion of Court.
7. Findings of Fact and Conclusions of Law.
8. Judgment.
9. Notice of Appeal.
10. Cost Bond on Appeal.
11. This designation.

/s/ WILLIAM L. PAUL, JR.,
Of Counsel for Appellant.

Copy received May 16, 1950.

[Endorsed]: Filed May 16, 1950. [139]

[Title of District Court and Cause.]

MINUTE ORDER MADE ON MARCH 14, 1950

At this time the court decreed, pursuant to argument relating to Interrogatories and submission last evening, that the objections of defendant were sustained excepting as to objection No. 3 of the set numbered 2 and 3. [140]

[Title of District Court and Cause.]

MINUTE ORDER MADE ON
JANUARY 19, 1950

This case came on before the court for perpetuating testimony for use at the time of trial of this case, for the reason that the witnesses will not be available at the time of trial. Wm. L. Paul, Jr., appeared for plaintiff and J. G. Williams, Attorney General and his assistant, John Dimond appeared for defendant. Thereupon Carl Wiedeman, Paul Ecklund, Christofer Nelson, Chris McNeil, George Lane, Joe Bigelow and Fred Soberg were duly sworn and their testimony recorded. [141]

[Title of District Court and Cause.]

ANSWER TO INTERROGATORY NO. (3) OF
SET OF INTERROGATORIES NO. 3 PRO-
POUNDED BY PLAINTIFF ON FEBRU-
ARY 28, 1950

United States of America
Territory of Alaska—ss.

M. P. Mullaney, being first duly sworn on oath, makes the following answer to Interrogatory No. (3) of the set of Interrogatories bearing the number "3" and propounded to him in the above-entitled cause on the 28th day of February, 1950:

Answer to Interrogatory No. (3): Yes. As far as is concerned the collection of fishermen's license

taxes from nonresident fishermen. It is more difficult and expensive to perform the functions of the Department of Taxation. It has been my experience as Commissioner of Taxation for the Territory of Alaska that many nonresident fishermen each year have attempted to evade payment of the nonresident fishermen's license tax, as compared with the relatively few resident fishermen who have attempted to evade payment of the resident fishermen's license tax. This situation, together with the fact that nonresident fishermen have no places of residence in the Territory, that they are within the jurisdiction of the Territory only for a very brief period of time each year and that for the great majority of that time are engaged in fishing, necessitating my sending an enforcement officer to the various fishing areas in Alaska each year in an attempt to enforce payment of the license tax against the nonresident fishermen. [142]

With reference to inheritance and transfer taxes, coin-operated amusement and gaming devices, motor fuel oil tax, return or refund of taxes, or any other Territorial taxes not solely concerned with fishermen in Alaska, I do not know whether or not it is more difficult and expensive to perform the functions of the Department of Taxation insofar as fishermen are concerned, due to the fact that such fishermen may be nonresidents. The reason for this is that no records of the Department of Taxation are maintained showing the status of

those paying such taxes—that is, whether they are fishermen, either resident or nonresident.

M. P. MULLANEY.

Subscribed and sworn to before me this 15th day of March, 1950.

[Seal] FLORENCE B. OAKES,
Notary Public for Alaska.

My commission expires: 1/10/53

Receipt of Copy acknowledged.

[Endorsed]: Filed March 15, 1950. [143]

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES PRO-
POUNDED BY PLAINTIFF ON FEBRU-
ARY 4, 1950

United States of America
Territory of Alaska—ss.

M. P. Mullaney, being first duly sworn on oath, in reply to the interrogatories propounded to him by plaintiff in the above-entitled cause on the 4th day of February, 1950, says:

1. Answer to Interrogatory No. 8: I am unable to submit an allocation of the cost of the services necessary and usual for the collection of the taxes mentioned in Interrogatories Nos. 1 through 7. Considering the myriad items and the various operations involved in the collection of license taxes

from fishermen in Alaska, a statistical analysis of the type requested by plaintiff would be virtually impossible due to the fact that my records are not maintained in a manner which would reflect the information requested.

2. Answer to Interrogatories Nos. 9 through 11: I am unable at this time to submit a comparative analysis of the amount of fishermen's license taxes collected directly from the fishermen and the amount collected through the canneries for the reason that statistics of this type, the preparation of which involves considerable time and detailed work, are not maintained on a perpetual basis.

3. Answer to Interrogatories Nos. 12 and 13: I am unable to answer these two interrogatories since I have no way of determining [144] the definite number of either resident or nonresident fishermen who engage in fishing in Alaska each year, and therefore I have no way of determining how many of those who fish evade payment of the license tax.

M. P. MULLANEY.

Subscribed and sworn to before me this 13th day of March, 1950.

[Seal]

FLORENCE B. OAKES,

Notary Public for Alaska.

My commission expires Jan. 10, 1953.

Copy Received, March 13, 1950.

[Endorsed]: Filed March 13, 1950. [145]

[Title of District Court and Cause.]

INTERROGATORIES OF PLAINTIFF

No. 1

(1) Attached hereto is a statement of licenses and taxes collected by the Department of Taxation of the Territory of Alaska. Will you please identify this as an official document of the Territory of Alaska?

(2) What services are necessary and usual in the Department of Taxation for the collection of Fishermen's licenses resident?

(3) What services are necessary and usual in the Department of Taxation for the collection of Fishermen's licenses nonresident?

(4) What services are necessary and usual in the Department of Taxation for the collection of Gillnets operated by resident fishermen?

(5) What services are necessary and usual in the Department of Taxation for the collection of Gillnet tax from nonresidents?

(6) What services are necessary and usual in the Department of Taxation for the collection of Seines operated by resident fishermen?

(7) What services are necessary and usual in the Department of Taxation for the collection of the tax on Seins operated by nonresidents?

(8) If it is possible from your records, please

allocate the cost of the services necessary and usual for the collection of the taxes mentioned in the Interrogatories, Nos. (1) through (7) for 1948.

(9) Please state the amount of fishermen's licenses taxes on residents actually collected directly from the fishermen for 1948? [146]

(10) Please state the amount of fishermen's licenses taxes on residents collected through canneries for 1948?

(11) Please state the same information as mentioned in the two interrogatories next-above with regard to nonresidents?

(12) What is the percentage or amount, whichever you prefer to state, of resident fishermen's licenses taxes which is not collected by your Department of Taxation because of concealment or avoidance in some manner by the tax payer?

(13) State the same information, if you are able to do so, with regard to the nonresident fishermen's license tax?

Submitted by:

/s/ WILLIAM L. PAUL, JR.,
Attorney for Plaintiff.

Copy Received Feb. 6, 1950.

[Endorsed]: Filed February 6, 1950. [147]

[Title of District Court and Cause.]

INTERROGATORIES OF PLAINTIFF

No. 2

(1) Has your Tax Department had any difficulty in securing land registration, and/or payment of taxes on land owned by nonresident fishermen? The taxes referred to in this interrogatory are those provided for at Section 22-2-1, ACLA 1949. And if your Tax Department had had such difficulty, describe the cost thereof and whether taxes have been collected in spite of such difficulty.

(2) Has the Department of Public Welfare expended any sums for the support of children of non-resident fishermen who have violated Section 21-3-1, ACLA 1949? If so, state the amount.

(3) How does the amount expended, named in the next question above, if any such amount, compare with the amount expended by the Department of Public Welfare for the support of children of resident fishermen who violate the same section?

(4) Has the Territory been put to any expense in the payment of or removal of false and fraudulent liens by nonresident fishermen, which liens are mentioned in Title 26, ACLA 1949? If so, state the amount of expense of payment or removal of such liens.

(5) Has the Territory been put to any extra expense as compared to resident fishermen, to effect the collection of negotiable instruments given to it

by nonresident fishermen? If so, state the amount.

(6) Is it more difficult and expensive for the Alaska Aeronautics and Communications Commission to administer and the Department of Taxation to pay for the administration of Title 32, ACLA 1949 insofar as fishermen, making use of facilities afforded by the Alaska Aeronautics and Communications Commission, is concerned, due to the fact that such fisherman may be a nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is.

(7) Is it more difficult and expensive for the Department of Agriculture to administer and the Department of Taxation to pay for the administration of Title 33, Chapter 1, ACLA 1949 insofar as fishermen, making use of facilities afforded by the Department of Agriculture, is concerned, due to the fact that such fisherman may be a nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is.

(8) Is it more difficult and expensive for the Territorial Banking Board and Territorial Banking Department to administer and the Department of Taxation to pay for the administration of Title 34, Chapter 3, ACLA 1949 insofar as fishermen, making use of facilities afforded by the Territorial Banking Board and Territorial Banking Department, is concerned, due to the fact that such fisherman may be a nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is.

(9) Is it more difficult and expensive for the Board of Accountancy, the Board of Territorial Law Examiners, the Unauthorized Practice of Law, Collection Agencies, Copyrighted Works, Cosmetology, Elbalmers, Engineers and Architects, Hotels and Boarding Houses, Junk Dealers and Metal Scrappers, Lobbyists, Second Hand Dealers and Pawn Brokers, Board of Examiners in the Basic Sciences, Board of Chiropractic Examiners, Dentistry, Drugs and Pharmacists, Territorial Medical Board, Nurse's Examining Board, Board of Examiners of Optometry, Board of Liquor Control, Inspector of Weights and Measures to Administer and [149] the Department of Taxation to pay for the administration of Title 35, ACLA 1949 insofar as fishermen, making use of facilities afforded by the above agencies, etc., is concerned, due to the fact that such fisherman may be a nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is.

(10) Is it more difficult and expensive for the Auditor of Alaska (with respect to Corporations of an ordinary business nature, and also with respect to his functions as Insurance Commissioner) to administer and the Department of Taxation to pay for the administration of Title 36, ACLA 1949, insofar as fishermen, making use of facilities afforded by the Auditor of Alaska (Corporations and Insurance Commissioner) is concerned, due to the fact that such fisherman may be a nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is.

(11) Is it more difficult and expensive for the Territorial Board of Education, Territorial Commissioner of Education and the Territorial Department of Education to administer and the Department of Taxation to pay for the administration of Title 37, ACLA 1949, insofar as fishermen, making use of facilities afforded by the Territorial Board of Education, the Territorial Commissioner of Education and the Territorial Department of Education, is concerned, due to the fact that such fisherman may be a nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is.

(12) Is it more difficult and expensive for the Attorney General to administer and the Department of Taxation to pay for the administration of Sec. 38-3-6, ACLA 1949, insofar as fishermen, making use of facilities afforded by the Attorney General, is concerned, due to the fact that such fisherman may be a nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is. [150]

(13) Is it more difficult and expensive for the Department of Health, the Uniform Narcotic Drug Act, the Sale of Diseased, Corrupted or Unwholesome Provisions, the Hospital Licensing Agency, the Alaska Housing Authority, Lost Persons, Pollution of Waters or Air, Shelter Cabins and Comfort Stations, Vital Statistics, Highways, Trails, Bridges and Ferries, the Territorial Board of Road Commissioners, and the Highway Engineer to ad-

minister and the Department of Taxation to pay for the administration of Title 40, ACLA 1940, insofar as fishermen, making use of facilities afforded by the above agencies, etc., is concerned, due to the fact that such fisherman may be a nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is.

Submitted by:

/s/ WILLIAM L. PAUL, JR.,
Attorney for Plaintiff.

Copy received Feb. 28, 1950.

[Endorsed]: Filed February 28, 1950. [151]

[Title of District Court and Cause.]

INTERROGATORIES OF PLAINTIFF No. 3

(1) Is it more difficult and expensive to perform the functions of the Territorial Department of Labor, including the Alaska Industrial Board, set forth in Title 43, ACLA 1949, including functions with regard to inspections and collections of statistics, preference of employment of residents, collection of wages, maximum hours of and minimum wages of women, Workmen's Compensation, and arbitration, and the Department of Taxation to pay for such administration insofar as fishermen, making use of the aforementioned functions, are concerned, due to the fact that such fishermen may

be nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is.

(2) Is it more difficult and expensive to perform the functions of the Alaska World War II Veterans Board and the Department of Taxation to pay for such administration insofar as fishermen, making use of the aforementioned functions, are concerned, due to the fact that such fishermen may be nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is.

(3) Is it more difficult and expensive to perform the functions of the Department of Taxation, not herein otherwise specified, insofar as fishermen are concerned, due to the fact that such fishermen may be nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is. Your attention is specifically called to inheritance and transfer taxes, coin-operated amusement [152] and gaming devices, motor fuel oil tax, and return or refund of taxes.

(4) Is it more difficult and expensive for the proper enforcement of Section 49-2-1 et seq., relating to Utility and School Districts, and the Department of Taxation, insofar as fishermen, attempting to make use of the rights and privileges afforded by such Act, due to the fact that such fishermen may be nonresident? If such difficulty and expense exists, from the fact of nonresidency, state what it is.

(5) Is it more difficult and expensive for the Board of Road Commissioners to administer and the Department of Taxation to pay for the administration of Title 50, ACLA 1949, insofar as fishermen, making use of facilities afforded by the Board of Road Commissioners, is concerned, due to the fact that such fishermen may be nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is. This interrogatory includes that portion of Title 50, ACLA 1949, relating to ownership certificates of vehicles, and licensing of the same, operation of vehicles, offenses committed by the owners of vehicles.

(6) Is it more difficult and expensive for the Department of Public Welfare to administer and the Department of Taxation to pay for the administration of Title 51, ACLA 1949, insofar as fishermen, making use of facilities afforded by the Department of Public Welfare, is concerned, due to the fact that such fishermen may be nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is. This interrogatory includes the facilities and money paid to destitute and needy persons generally, and to the Pioneer's Home, aid to dependent children, Old Age Assistance, and burials, juveniles, insane persons.

(7) Is it more difficult and expensive for the Employment Security Commission to administer and the Department of Taxation to pay for the administration of Title 51, Ch. V., ACLA 1949, insofar as fishermen, making use of facilities afforded

by the Employment [153] Security Commission, is concerned, due to the fact that such fishermen may be nonresident? If such difficulty and expense exists from the fact of nonresidency, state what it is.

Submitted by

/s/ WILLIAM L. PAUL, JR.,
Attorney for Plaintiff.

Receipt of copy acknowledged.

[Endorsed]: Filed February 28, 1950. [154]

PLAINTIFF'S WAIVER

William L. Paul, Jr., Attorney-at-Law,
Juneau, Alaska

February 4, 1950.

Attorney General of Alaska,
Juneau, Alaska

Re: Plaintiff's Interrogatories in
Anderson v. Alaska

Dear Sir:

Pursuant to our conference of yesterday, plaintiff hereby waives direct answer to interrogatories one through seven for the reason that the information requested therein is better obtained in oral testimony of the officials of the Department of Taxation.

. Yours very truly,

/s/ WILLIAM L. PAUL, JR.,
Of Plaintiff's Attorneys.

[Title of District Court and Cause.]

SUPPLEMENTAL DESIGNATION OF
THE RECORD

To the Clerk of the District Court for the Territory
of Alaska:

You are hereby requested to prepare, certify and transmit to the Clerk of the United States Court of Appeals for the Ninth Circuit at San Francisco, with reference to the notice of appeal heretofore filed by appellants in this cause, transcript of the record in said cause, prepared and transmitted as required by law and by rules of said court, and to include in said transcript of record the following documents or certified copies thereof, to wit:

1. Journal entry at page 385, of March 14, 1950.
- 1a. Journal entry in Journal 19 at page 362, of January 19, 1950.
2. Defendant's Answer to Interrogatory No. 3, filed March 15, 1940.
3. Defendant's Answer to Interrogatories filed March 13, 1950.
4. Plaintiff's Interrogatories numbered 1, 2 and 3.
5. Plaintiff's Waiver of February 4, 1950.
6. This Supplemental Designation.

/s/ WILLIAM L. PAUL, JR.,
Of Appellants' Counsel.

cc. mailed to Attorney General 5/19/50.

[Endorsed]: Filed May 19, 1950. [156]

[Title of District Court and Cause.]

STATEMENT OF POINTS

1. That Chapter 66 of the Session Laws of 1949 (approved March 21, 1949) of the Territory of Alaska, enacted by the territorial legislature in the 1949 session, in its entirety and as to each and every section thereof, is unlawful and unconstitutional in that it violates Section Nine of the Organic Act of the Territory of Alaska; Article 1, Section 8, and Article 3, Section 2, of the Constitution of the United States and the 14th Amendment to the Constitution of the United States.

2. The finding of the District Court that approximately ninety per cent (90%) of the cost of collecting the license tax from nonresident fishermen is required to collect or enforce the same is not substantiated under the testimony and evidence.

3. Conclusion number one (I) of the District Court that Chapter 66 of the Session Laws of 1949, Laws of Territory of Alaska, does not contravene the Organic Act and United States as enumerated in Point 1, is wrong. [157]

4. Conclusion number two (II) of the District Court that Chapter 66 of the Session Laws of 1949 is valid because it rests on substantial differences bearing a fair and reasonable relation to the object of the legislation, is wrong.

5. That Conclusion number three (III) that the \$50.00 license fee imposed on nonresident fishermen

under Chapter 66 is reasonable and not excessive, is wrong.

6. That Conclusion number four (IV) of the District Court that Chapter 66 is a valid Act, and the complaint and amended complaint should be dismissed, is wrong.

7. That the judgment and decree entered in said cause dismissing the complaint and amended complaint is in error.

/s/ WILLIAM L. PAUL, JR.,
Of Counsel for Appellants.

[Endorsed]: Filed May 24, 1950. [158]

[Title of District Court and Cause.]

STIPULATION TO CORRECT TRANSCRIPT OF TESTIMONY

It is hereby stipulated by the parties, acting through their respective counsel that the transcript of testimony may and hereby is corrected as follows (all page and line numbers are to original transcript):

1. In line 6 on page 39, change 26 to 36.
2. In line 3 on page 42, change "trap to clean up its gear" to "cannery to clean up its gear"; and change "to get the trap beached" to "to get the traps beached."
3. In line 17 on page 57, change as to by.

And that this stipulation is to be regarded as parts of the designations of portions of the record to be printed previously made by the parties.

WILLIAM L. PAUL, JR.,
Of Appellants' Attorneys.

JOHN H. DIMOND,
Of Appellee's Attorneys.

[Endorsed]: Filed June 20, 1950. [159]

In the District Court for the Territory of Alaska,
Division Number One, at Juneau
No. 6102-A

OSCAR ANDERSON and ALASKA FISHER-
MEN'S UNION, a Labor Union Acting on
Behalf of a Certain of Its Members,
Plaintiffs,

vs.

M. P. MULLANEY, Commissioner of Taxation of
the Territory of Alaska,
Defendant.

REPORTER'S TRANSCRIPT
OF RECORD

Be It Remembered, that on the 16th day of March, 1950, at 10:00 o'clock a.m., at Juneau, Alaska, the above-entitled cause came on for hearing, the Honorable George W. Folta, United States District Judge, presiding; the plaintiffs appearing

by William L. Paul, Jr., their attorney; the plaintiff Oscar Anderson appearing in person; the defendant appearing by J. Gerald Williams, Attorney General of the Territory of Alaska, and John Dimond, Assistant Attorney General of the Territory of Alaska;

Whereupon, the following occurred:

Mr. Paul: I have agreed orally with counsel to a stipulation in open court, for it has not been our intent or desire to maintain this action against the Territory of Alaska, and I think that counsel on both sides assumed all along that [1*] the action was against M. P. Mullaney, Commissioner of Taxation of the Territory of Alaska, and counsel may indicate at this time if he agrees in open court that M. P. Mullaney, as Commissioner of Taxation of the Territory of Alaska, may be substituted in place of the Territory of Alaska as defendant.

Mr. Williams: That is agreeable with the defense, your Honor.

The Court: Well, the case then will be continued in the name of M. P. Mullaney as defendant.

Mr. Paul: There should be then, your Honor, a change in the description in Paragraph I of the body of the Complaint.

The Court: Well, you may make whatever amendments a change of that kind would require.

Mr. Paul: Just a formal description is all.

Whereupon, William L. Paul, Jr., attorney for plaintiffs, made the opening statement in behalf

* Page numbering appearing at bottom of page of original Reporter's Transcript.

of plaintiffs; and no statement was made in behalf of defendant.

Whereupon, the trial proceeded as follows:

PLAINTIFFS' CASE

OSCAR ANDERSON

called as a witness on behalf of the plaintiffs, being first duly sworn, testified as follows on

Direct Examination

By Mr. Paul:

Q. Your name is Oscar Anderson, is it?

A. It is. [2]

Q. And you are described in the pleadings of this case as Oscar Anderson. Mr. Anderson, do you occupy any position with the Alaska Fishermen's Union now? A. I do.

Q. How long have you been a member of the Alaska Fishermen's Union?

A. Thirty years on the 10th of next month.

Q. How long have you been Secretary-Treasurer of the Alaska Fishermen's Union?

A. One year.

Q. You have been a Branch Agent also?

A. Yes. I was Branch Agent for eight years.

Q. And what Branch?

A. Seattle Branch.

Q. How many Branches does the Alaska Fishermen's Union have?

A. We have six Branches.

(Testimony of Oscar Anderson.)

Q. And what are their locations?

A. San Francisco, Portland, Bellingham, Ketchikan, Anchorage and Dillingham.

Q. Dillingham?

A. Dillingham. It is in Bristol Bay.

Q. About how—well, now about how many members does your union have?

A. At the end of the year we had five thousand two hundred and some members. [3]

Q. Are they residents and nonresidents mixed in together? A. Yes.

Q. Now, Mr. Anderson, did this question of payment of taxes, that we are concerned with, come up before your members in the Branches?

A. Yes; in the Branches and headquarters as well.

Q. Was there any action taken by the various Branches?

A. Yes. They recommended to headquarters that we take this matter to court to determine whether there is discrimination against nonresidents.

Q. When I say "Branches," I mean was there action taken by all Branches?

A. Yes; as far as I can remember. I don't know what action was taken in the Dillingham Branch as that Branch does not meet very regularly—now and then.

Q. Is this your testimony, that the Anchorage, Ketchikan and the three states' Branches all considered this matter?

(Testimony of Oscar Anderson.)

A. Yes. They approved the action of—taken in Branch meetings and at headquarters.

Q. Now, do you know—first, let's put it this way. Have the nonresident fishermen members of your union paid the fifty-dollar tax?

A. If they have paid it?

Q. Have they paid it?

A. Yes, they have paid it. [4]

Q. Do you know some particular men who have paid it that you can name off?

A. Well, I would say they are all paid, of course. I can name certain fellows, of course.

Q. Did you make up a little list here a couple days ago? A. Yes.

Q. Handing you this list, can you tell whether those men, being members of your union, have paid the nonresident fishermen's tax?

A. All paid. They worked at canneries where they deduct the license.

The Court: Maybe it is something that could be stipulated anyhow, isn't it?

Mr. Paul: Yes. I was going to read it in the record. As long as the names are so hard to spell, I can give it to the Court Reporter.

The Court: If the defendant is willing to stipulate that fishermen, not necessarily these named but generally, have paid the tax, why that obviates the necessity of proving payment by specific persons.

Mr. Williams: The defendant is willing to stipulate that some nonresident fishermen have paid, but

(Testimony of Oscar Anderson.)

whether or not these men have paid we are not willing to stipulate at the present time without checking the records of the tax——

Mr. Paul: My main purpose is—members of this [5] Alaska Fishermen's Union, nonresident fishermen, have paid the tax. If counsel wants to stipulate that some members of this Union have paid the nonresident license tax——

Mr. Williams: We would even be willing to stipulate that some members of this Union have paid the tax.

The Court: Let the record so show.

Q. Now, you have been Branch Agent of the Seattle Branch for eight years and Secretary-Treasurer for one year? A. Yes.

Q. Have you occupied any other position in your union?

A. Yes. Oh, several years I have been cannery delegate.

Q. Can you give us an approximate idea how many years you have been cannery delegate?

A. Except to say I have been cannery delegate at least twelve, fourteen years out of the time I have been fishing in Alaska.

Q. While you were Branch Agent and Secretary-Treasurer you have not actually been doing any fishing yourself? A. No.

Q. The rest of the time did you do fishing in Alaska? A. Yes.

Q. What kind? A. Salmon.

(Testimony of Oscar Anderson.)

Q. Gill netting or——

A. Gill netting; and prior to that, before I became a member [6] of the Alaska Fishermen's Union, I worked in the Southeastern District here.

Q. What kind of a job?

A. I was working on the traps one year, and I was gill netting in Taku here two years.

Q. Most of the rest of the time you have been gill netting up at Bristol Bay? A. Yes.

Q. Now, what do the members of your union do, what kind of work, Mr. Anderson?

A. Where? In Alaska?

Q. Yes.

A. Our contract provides that——

Q. Just name it generally. A. Fishing.

Q. Gill netting in Bristol Bay? A. Yes.

Q. What about tendermen and trapmen?

A. They work on the traps; certain men work on the traps and some on the tenders.

Q. And do you have some culinary workers too on floating equipment?

A. Yes, we have culinary workers.

Q. About how many of your members are resident Alaskans?

A. It is safe to say that about not less than in the neighborhood [7] of two thousand men actually fishing, in the culinary department and on the tenders, are mostly nonresidents.

Q. My question is, how many of your five thousand two hundred members are resident Alaska fishermen?

(Testimony of Oscar Anderson.)

A. I would judge approximately two thousand.

Q. And about how many of your fifty-two hundred members are nonresident Alaska fishermen?

A. Just about, pretty much about half, that are actually fishing; yes, either on traps or gill netting.

Q. That would mean about sixteen hundred nonresident fishermen? A. Yes.

Q. Have you ever had occasion to become familiar with other methods of fishing and other activities of other unions in the fishing industry in Alaska?

A. Yes. I am pretty well acquainted with any kind of fishing that goes on on the coast here.

Q. How have you been familiar?

A. I am in constant contact with them more or less, and I also done other kinds of fishing after the Alaska fishing season was over.

Q. I am still talking about Alaska fishing. I don't care about down below. How have you become familiar with the practices of the Alaska fishing industry in other unions?

A. Well, every year we hold coordinating meetings, get together [8] on different operations of gear and discuss the fishing problems together.

Q. They have these coordinating fishing meetings, do they, in Seattle? A. Yes.

Q. Every year? A. Several times a year.

Q. First let me identify your position a little more. Who is the executive officer and business manager of your union?

(Testimony of Oscar Anderson.)

A. I am at this time.

Q. That is, Secretary-Treasurer?

A. Secretary-Treasurer; yes.

Q. Really the boss, you might say?

A. Yes.

Q. And in such position or as Branch Agent you have conducted collective bargaining negotiations?

A. Yes. When there is negotiation of a contract the Branch Agent always is in the negotiation.

Q. And the Secretary-Treasurer is really the one that gets the thing moving? A. Yes.

Q. What are some of these other unions in Alaska insofar as fishing is concerned?

A. Purse Seiners. [9]

Q. United Fishermen of the Pacific?

A. United Fishermen of the Pacific, yes. And then the trollers, and the trollers, nonresident trollers, are mostly members of the Cooperative.

Q. They have a business cooperative?

A. Yes; they have some kind of a cooperative.

Q. Do you know if that cooperative acts in Alaska or do the trollers sell in the open market?

The Court: Is all this material here?

Mr. Paul: I was laying a foundation, and I am about through laying the foundation. I am about to ask what nonresidents come to Alaska, how they mix in or don't, and following my theory of the case——

The Court: You mean they are all members of this union?

(Testimony of Oscar Anderson.)

Mr. Paul: No. There will be these other unions—a good deal less than the Alaska Fishermen's Union does—that enter into it.

The Court: How?

Mr. Paul: They send nonresident fishermen up here.

The Court: They are not in the case.

Mr. Paul: I judged the case to involve the description of a class, your Honor, of the activities of a class, of nonresident fishermen whether they belong to this union or any other union. [10]

The Court: They have to stand on their own feet, not somebody else's. They are the plaintiffs.

Mr. Paul: Since the Alaska Fishermen's Union does not constitute the entire class, testimony relating solely to the Alaska Fishermen's Union members might not be representative of the entire class, and I will be engaged in showing——

The Court: That may be; but you have only the one plaintiff here. That is the Alaska Fishermen's Union. So it seems to me what activities the members of other unions might have would not be relevant here.

Mr. Paul: Just so far as they fit into the class. If the Court feels it is immaterial, I am only too happy to shorten the testimony.

The Court: I think it is immaterial unless it develops upon the hearing that it is material and then the Court will let you go into it, but I don't think it is material.

(Testimony of Oscar Anderson.)

Mr. Paul: All right.

Q. Mr. Anderson, we will just confine the questions to the Alaska Fishermen's Union. How are nonresident fishermen hired for fishing in Alaska?

A. They apply to the company for the jobs.

Q. You have no hiring hall?

A. No, we have no hiring hall.

Q. Is there any preference of hiring that the companies follow? [11]

A. No. Naturally all the employees who have been satisfactory always get their job back, but if any employees are not desirable they send them notice by December 31st that they are not wanted for the following season.

Q. What is the labor turnover among nonresident fishermen per year?

A. It is very little; probably ten per cent would be about the most.

Q. What is the cause of the labor turnover, do you know?

A. Well, either that a man for one reason or another may not feel like going to Alaska, or maybe sickness in the family, or one thing or another.

Q. What is the larger cause for the turnover?

A. Well, I will say it would be that—that is pretty hard for me to say what is the reason, but there is many things could enter into that that a man cannot even go to Alaska.

Q. Death?

A. Death, sickness, or a better job for that year, or something of that kind.

(Testimony of Oscar Anderson.)

Q. When a man is employed by a canning company to come to Alaska, is he required to take a physical examination?

A. Yes; very strict; more so now.

Q. Who gives the examination?

A. They have an industry doctor, a doctor that examines all employees for all canneries. [12]

Mr. Williams: Your Honor, I would like to object to this line of testimony unless we can tie it into the case—ten per cent turnover, physical examinations, they are not material.

The Court: The turnover might be relevant, but the causes of the turnover and any testimony with reference to physical examinations, I don't think that is material.

Mr. Paul: It might be material in this sense, that if the industry is very careful to send healthy capable men, healthy from the standpoint of taking advantage of hospitals provided by the Territory——

The Court: The only thing that would be shown is that they have superior physiques to residents if you can show anything like that. I think the objection will have to be sustained.

Q. Now, with respect to—how do these men get to Alaska, nonresident fishermen members of your union?

A. At this time they are mostly flown into Alaska.

Q. They leave Seattle. Do they stop at any point en route to Bristol Bay?

(Testimony of Oscar Anderson.)

A. They have gone directly pretty much from Seattle to Naknek Airbase, but it happens occasionally that they have stopped at Yakutat, that is the only place, if they had to stop for something.

Q. What would they stop at Yakutat for? [13]

A. Probably—I couldn't tell.

The Court: I think that is going far afield.

Mr. Paul: We can show, your Honor, that these men virtually never come into contact with any Territorial office or any of the facilities provided by the Territory.

The Court: You are showing the opposite when you show they stop at Yakutat and what for.

Mr. Paul: The next question will be—how long.

The Court: Having brought out that they stop at Yakutat, which is not necessary, you are put in the position of extricating yourself from any unfavorable inferences, so preliminarily I think it is sufficient that they are flown to Naknek and occasionally stop en route, but why or how—I feel I have to impose some limit here because of a lack of time.

Mr. Paul: I appreciate that, your Honor. I am only trying to be quite fair in presenting a complete picture of the events.

Q. They go almost invariably to Naknek, as you testified?

A. Yes.

Q. Who operates Naknek Airbase?

A. The Federal Government.

Q. Do you know of any hospital or anything in

(Testimony of Oscar Anderson.)

connection with Naknek Airfield? A. None.

Q. Who maintains the messhouse? [14]

A. Alaska Salmon Industry.

Q. Where are the men transported when they land at Naknek Airbase and how?

A. They take them down on power scows or also they fly some to remote canneries up there by airplane.

Q. The employer does that? A. Yes.

Q. Do any of these men bring their families up here with them— A. No.

Q. Women and children? A. No.

Q. After the men arrive at the individual canneries who provides board and room and other facilities? A. The company who they fish for.

Q. That includes living, sleeping and eating quarters? A. Everything.

Q. Everything that the men probably need?

A. Yes.

Q. Just to shorten this up a little—are there established contracts which govern all these relations between your union and the Alaska Salmon Industry's canneries?

A. I beg your pardon?

Q. Are there contracts which define all these things? A. Yes. [15]

Q. Are the men up there allowed to draw any money during the season?

A. No; that is, it is very seldom that money is drawn.

(Testimony of Oscar Anderson.)

Q. Is there any policy that you know of pursued by the Alaska Salmon Industry or the canneries up there regarding the use of liquor?

A. They are very strict now not to permit any liquor in the canneries.

Q. And if liquor is found at the canneries what do they do?

A. In many cases the employee is discharged if found to be using liquor during the fishing season.

Q. If an employer suspects that a request for money is made to obtain liquor, is there anything done? What do the canneries do about that?

A. He won't get any.

The Court: Do the employees ever admit it is for liquor?

A. Well, I don't believe they would tell the superintendent they want it for liquor; no.

Q. Has your union any policy with respect to the use of liquor during the fishing season at Bristol Bay? A. What is that?

Q. Does your union have any policy with respect to the use of liquor during the fishing season up in Bristol Bay?

A. Yes. If drinking is going on the members would object to [16] it and report it to the superintendent.

Q. Does your union have any policy with respect to violations of any other law; for instance, like the use of small mesh nets?

A. Yes. We impose a fine of two hundred and fifty dollars for anyone caught with illegal gear.

(Testimony of Oscar Anderson.)

Q. In recent years have you heard of violations by your members in Bristol Bay?

A. No. They live up to it pretty strict.

Q. Would it come to your attention?

A. Yes, it would. If anyone was fined during the season, it would be reported to the membership and what company.

Q. The fishermen check up on themselves?

A. Yes.

Q. Is that easy to do up there?

A. Yes. That is pretty strict that way.

Q. Well, the bay is so wide open everybody can see everybody else, can't they?

A. Yes. It is daylight up there so, if it is early in the morning or late at night when a closed period comes in, we can see whether a boat is fishing or not.

Q. Now, if there is any problem of the excessive use of liquor or drunkenness——

The Court: Isn't all this part of the rebuttal?

Mr. Paul: We are carrying the burden of proof, and [17] in that sense the positions are reversed, so that one might say ordinarily this would be rebuttal except we have to carry the burden of attacking the statute.

The Court: You take the position that you have to negative the existence of any basis for classification?

Mr. Paul: Yes.

The Court: All right.

Q. If there were any problem of the excessive

(Testimony of Oscar Anderson.)

use of alcohol or drunkenness either among individual members of your union or among a group of members of your union, would that fact come to your attention? A. Yes.

Q. As Secretary-Treasurer of your union?

A. Yes. I may state that the liquor store in Bristol Bay is closed during the fishing season.

Q. At these canneries are there any medical or hospital facilities? A. Yes.

Q. Who provides them?

A. The company.

Q. That is part of your contract? A. Yes.

Q. What do these medical and hospital facilities consist of?

A. They have small hospitals and with planes, if there are any serious cases, they may take them to Anchorage. Fishermen [18] living or fishing on Kvichak River fly to Anchorage.

Q. Is there any doctor connected with these small hospitals?

A. Yes; young doctors mostly; mostly first aid. No operations are performed at those hospitals. If they require an operation, they are sent to Dillingham or Anchorage, but mostly to Anchorage.

Q. Does your contract with the industry provide for any benefits in case of sickness or injury?

A. It provides for medical and hospital care.

Q. What about pay?

A. A fisherman, if he is sick or injured, or if he is sick after half of the red salmon season is

(Testimony of Oscar Anderson.)

over, then he gets an average of the fish caught for the remainder.

Q. An average? A. Yes.

The Court: Of this particular union, or is that the practice of the Alaska Salmon Industry?

A. No. Particularly this union.

Q. Are there any fishermen in Bristol Bay, residents or non-residents, who are not members of your union?

A. No. They are all members of the union.

Q. One hundred per cent? A. Yes.

Q. Now, when you say "average," what do you mean?

A. If they figured up how much fish was caught from that date [19] and then divided it up among so many boats fishing, and you derive an average from there.

Q. Is there one or two averages for each cannery? A. Only one.

Q. Residents and nonresidents are averaged together? A. There is only one average.

Q. To compute the earnings? A. Yes.

The Court: You mean—oh, for the purpose of this average.

Mr. Paul: The purpose of this average apparently is to pay the average to sick fishermen.

The Court: Oh.

A. Yes.

Q. Suppose a fisherman is injured; does the same rule apply?

(Testimony of Oscar Anderson.)

A. No. Then it comes under the Alaska Workmen's Compensation Act.

Q. Is that in the contract you have with the industry?

A. We have it in the contract, yes, as far as a fisherman is concerned, but a tenderman, he can choose to be covered either by the Jones Act or the Alaska Workmen's Compensation Act.

Q. Is that in the contract?

A. That is in the contract.

Q. When was that first in the contract? [20]

A. A year ago.

Q. Nineteen—— A. 1949.

Q. Suppose the fisherman or a tenderman up in Bristol Bay, a member of your union, gets fired at any time during the season, at any time while he is in Alaska, what is the employer required to do, if anything?

A. Provide him with transportation out of the Territory.

Q. Back to Seattle?

A. Back to the Port of Embarkation.

Q. That is Seattle?

A. One hired in Anchorage would be shipped back to Anchorage.

Q. So far as a nonresident fisherman is concerned, it means usually that he would go back to Seattle? A. He goes to Seattle.

Q. Are there any canneries up in Bristol Bay not members of the Alaska Salmon Industry?

(Testimony of Oscar Anderson.)

A. No. All are members of the Alaska Salmon Industry that operates in Bristol Bay.

Q. Do the canneries have any policy of transporting men who quit any time during the season?

A. Yes. They send them back to where they were hired.

Q. Do you know if they follow that policy?

A. Strictly.

Q. And at whose expense do they go outside when they quit? [21]

A. The company's.

Q. When they quit voluntarily?

A. Oh. If they quite voluntarily, then they have to provide their own transportation.

Q. So there is no misunderstanding—when a man quits voluntarily, do the companies have any policy of shipping the man back to the Port of Embarkation?

A. Yes. They mostly provide or arrange for transportation to get out of the Territory.

Q. Even though at the man's own expense?

A. Yes.

Q. Now, at the end of the season you have, I believe, what we call the fall run money work.

A. Yes. Spring and fall run money.

Q. About how long does the fall run money last for nonresident fishermen?

A. It takes approximately ten days to load out the pack if it is an ordinary season.

Q. Do you have any problem of nonresident

(Testimony of Oscar Anderson.)

fishermen quitting during the fall run money work?

A. No. They stay pretty well until it is done otherwise they will forfeit the run money.

Q. The one hundred dollars? A. Yes.

Q. Is there any problem of resident fishermen quitting or not [22] doing the fall run money work?

A. Yes. We had a considerable lot of those cases.

Q. Do you know why residents quit or fail to work the fall run money work?

A. Some probably wanted to go and have something to drink, and that is the reason in many cases.

Q. Now, when the fall run money work is over, what do the companies do with the men?

A. The nonresidents?

Q. Yes. A. Send them home.

Q. The same way as they came up?

A. Yes.

Q. When are the men paid?

A. The resident fishermen are paid up——

Q. I don't care about the residents. Let's have the nonresidents.

A. They are paid off at the Port of Embarkation. They are supposed to be paid off within forty-eight hours after arrival at the Port of Embarkation.

Q. Do the nonresident fishermen or other non-resident members get any shore money?

A. Yes. They get ten dollars shore money or twenty.

(Testimony of Oscar Anderson.)

Q. Where and when is that money given them?

A. Just before arrival at the Port of Embarkation. [23]

Q. In other words, on the airplane just about as they arrive at Seattle why ten dollars apiece or twenty is passed out?

A. When they fly it is passed out at Naknek airbase, and some are given that money just when they are ready to leave the cannery and one member is designated as paymaster and pays the men when they arrive at the airfield in Seattle.

Q. What is the dispersion of resident and non-resident fishermen at any particular cannery?

A. Dispersement?

Q. Fifty-fifty; forty-sixty; or what?

A. Pretty much fifty-fifty; that is, actually fishermen.

Q. What about tendermen who tend to the fish boats and tow them around?

A. Well, they are pretty much nonresidents; yes.

Q. I have been talking about Bristol Bay a good deal. You have, I believe, members in Southeastern Alaska, too? A. Yes.

Q. What kind of work—they are tendermen and trapmen? A. And culinary workers.

The Court: You mean your members are limited to Bristol Bay and Southeastern Alaska?

A. No. All over Alaska; westward, canneries located on the south side of the Peninsula and the

(Testimony of Oscar Anderson.)

Shumagin Islands. That is what we call the Westward District, and then Cook Inlet. [24]

The Court: You might say your members are distributed all over Alaska?

A. Yes, all over Alaska.

Q. Now, with respect to the tendermen and trapmen in Southeastern Alaska, what proportion of nonresidents are there among those two classes of workmen who are members of your union?

A. I will say there is more nonresidents.

Q. About how many nonresidents are there? I think you gave a figure of sixteen hundred.

A. Yes, I would judge just about probably; that takes in the Southeastern trapmen.

Q. I will put it the other way. How many resident trapmen and tenderman are there in Southeastern Alaska?

A. Well, it is rather difficult. There is not so many. They mostly, when the fish season starts, they either do purse seining or—mostly purse seining.

Q. Well, would a figure, say, of one hundred resident tendermen and trapmen be pretty close to a correct figure?

A. Well, I would say probably that the resident people would be about one-third of the trapmen and tendermen.

The Court: I don't quite get this. You mean residents would constitute one-third of the trapmen and tendermen?

(Testimony of Oscar Anderson.)

A. Yes; here in Southeastern Alaska.

The Court: Well now, when you speak of tenders—you [25] mentioned purse seiners a while ago—you don't include purse seiners?

A. No. No. Tenders. We have what we call tenders that tend to the traps and brail the traps and so on; in other words, service the canneries.

The Court: Well, are there tenders that do any other kind of work in connection with the operation of a cannery than tending to traps or brailing?

A. No; that is all.

Q. Then about five hundred residents and about a thousand nonresidents are tenderman and trapmen?

A. Yes. It will probably vary a little bit one way or another, but that is just about what it would be.

Q. Do you know of any tendermen or trapmen in Southeastern Alaska who are not members of your union?

A. No. We have pretty well everybody—members of our union.

Q. Now, with respect to the transportation of—first, let's ask this question. Do you have a contract between your union and the Alaska Salmon Industry covering trapmen and tendermen in Southeastern Alaska? A. Yes.

Q. Now, I would like to hurry over this as much as possible. I want to ask you the same questions I did before about how these men—the nonresident

(Testimony of Oscar Anderson.)

trapmen and tendermen—are hired and how they get up here. [26]

A. They are hired in Seattle.

Q. Yes. Let me ask you this question first. Do you know of any substantial difference in the method of hiring and firing and transportation between what you have testified about the Bristol Bay fishermen and what actually goes on about tendermen and trapmen in Southeastern Alaska?

A. It is practically the same.

Q. Is there this difference, that the men when they come up in the airplanes generally touch at one of the larger towns? A. Yes.

Q. Like Ketchikan? A. Yes.

Q. Or Juneau?

A. Yes. The tendermen, they mostly come up on tenders from Seattle because the tenders are taken back to Seattle in the fall, and so the tendermen come up on a regular tender, cannery tenders, but the trapmen, those that work on the traps and so on, they may be flown in all right.

Q. And they touch at one of the larger towns in Southeastern Alaska?

A. Well, nearest to the cannery so they can be dispatched in to the cannery where they are going to work.

Q. And with respect to the excessive use of alcohol, do you know whether the companies in Southeastern Alaska have the [27] same policy as you described about Bristol Bay?

(Testimony of Oscar Anderson.)

A. No. I will say this. I think our men are, as far as the nonresidents are concerned, are behaving very well.

Q. Most of the companies have the same policy against drunkenness as you have described about Bristol Bay?

A. Yes. If a man is going to work in a gang and he is drinking, naturally the gang will not stand for it and make a complaint to the superintendent.

The Court: What about when they are in port?

A. Well, they are not so very much in port. Of course, it is now and then, but pretty much with the nonresident they are a family man and they probably can't afford to blow in too much money for liquor.

Q. Would it ever come to your attention if a man is fined or imprisoned on account of drunkenness, we will say in port like on July 4th?

A. Well, there hasn't been much of that brought to my attention.

Q. Now, if a man were to be imprisoned and given a sentence, we will say, of ten days, causing him to lose time from his job, would such a situation come to your attention?

A. Oh, yes; yes.

Q. How or why?

A. The man would mostly be fired; if he doesn't show up on the job, why he is fired and that would be reported by the [28] delegate.

Q. To you? A. Yes.

(Testimony of Oscar Anderson.)

The Court: Well, if there are any drunken fishermen around Ketchikan during the fishing season, they are not members of your union; is that correct?

A. Well, we have our percentage, too; I will say that. But really I don't believe our members are as bad as they used to be at one time.

Q. Do you know how taxes are paid by members of your union, nonresident members?

A. It is deducted by the companies from the man's earnings.

Q. Has the question ever come up as to whether these deductions should be made?

A. No, it has not. The boys consider it a service that the companies deduct it so they don't have to go to the trouble of applying for licenses and so on. The companies see to that.

Q. Do you know of a refusal by any cannery at any time to make the deductions for the fishermen from their pay, tax deductions?

A. No, never.

Q. Do you know of any refusals any place in Alaska at any time where the men have refused to permit the deductions from their pay for taxes by the canneries? [29]

A. No, I don't. The only thing was——

Q. Would such information come to your attention if the men would refuse to allow the deductions?

A. Yes. Last summer from one cannery I had

(Testimony of Oscar Anderson.)

a telegram asking whether the men should pay the fish license or refuse to have the company deduct it or whether they should allow the company to deduct it under protest, and I wired them back that they should allow the company to deduct the fish license until it was proven in court whether this law was valid.

Q. You didn't quite answer my question. Would it ordinarily come to your attention——

A. Yes, it would.

Q. If fishermen, either individually or as a group, in some cannery refused to permit the cannery to make deductions from their pay for taxes?

A. Yes; that would come to my attention.

Q. How is that?

A. The delegate would report it.

Q. The delegates make—how often do they make reports, and what requires them to make reports?

A. They keep a record of what goes on at the cannery, what concerns the union, and then they make their report in the fall when they come home.

Q. Do you know of any member of your union any place in [30] Alaska in the fishing—engaged in fishing, or trapmen or tendermen, who has become a public charge, a charge on the public?

A. I don't believe so.

Q. Well, would a fisherman, or do you have any provision in your union management for learning of such a thing if it did occur?

A. Yes; I would. I may state this, that we

(Testimony of Oscar Anderson.)

have had some isolated cases where a man became mental up there and had to be sent to the Morningside Hospital in Portland, Oregon. That is about the only thing I know of.

Q. Is there any method of reporting that the delegates are required to follow with regard to a man becoming sick or dying or becoming destitute?

A. He gets a report from the first aid station over there, from the medical journal there; they get the copy of all the cases handled at the station or hospital, and that is turned in to me at the end of the season.

Q. That takes care of sickness or injury?

A. Yes.

Q. I am talking about destitution now that would require a man to become a charge on the Territory. Is there any method which requires the delegate to report possible situations to you?

A. Yes; mostly reports of what takes place at the cannery [31] when a man gets sick or so and that he becomes a burden on the Territory; naturally that probably would be reported.

Q. Have there been any reports of destitution made concerning any resident members of your union?

A. Yes. We have several cases when there has been a request for financial aid and so on to help sick or destitute members up there.

Q. Concerning residents?

A. Amongst the residents; yes. We have a fund set aside for that purpose.

(Testimony of Oscar Anderson.)

Q. What do you call that fund?

A. We call it the Library Fund.

Q. The Library Fund. That Library Fund is made up from dividing money?

A. Yes; and fines imposed on the members for one thing or another; that goes to that fund.

Q. Do nonresident fishermen bring up any automobiles? A. No.

Q. Do you know if any of them own automobiles in Alaska? A. No.

Q. You don't know?

A. No. I don't think they would need them up here.

Q. Is it provided in your contract with the Salmon Industry, touching on fishermen, tendermen or trapmen, that the [32] employer has a right to inspection of baggage?

A. Yes; as provided for in our agreement.

Q. Do the companies ever exercise that right?

A. They have occasionally; yes.

Q. And for what cause?

A. Well, on the northbound trip they probably suspected that somebody was selling liquor, and they would demand to search the baggage, and on the southbound trip it would probably happen that the baggage was inspected with the possibility that some company tools or something was in the baggage.

Q. Stolen tools? A. Also——

Q. Also what?

(Testimony of Oscar Anderson.)

A. Well, for illegal furs. Baggage have been inspected now and then to determine whether any illegal fur is taken out of the Territory.

Q. And what about small mesh nets?

A. Beg pardon?

Q. And what about small mesh nets?

A. Well, that has also been inspected to see if there was small mesh nets also.

Q. While you were delegate and since you have become Branch Agent and Secretary-Treasurer, have you ever had any experience with hearing of, from reports to you or seeing [33] disturbances of the peace, fighting, assault and battery among the nonresident fishermen? A. No.

Q. Or nonresident fishermen on one side?

A. No. There hasn't been much of that stuff going on.

Q. When is the last case?

A. Well, I have never had an experience as far as I am concerned at canneries where I have been.

Q. Do companies follow any policy with regard to fighting, assault and battery, things like that?

A. Well, they would discharge a man.

Q. Have you ever heard of a man being discharged for fighting? A. Yes.

Q. Resident or nonresident?

A. Well, there have been both nonresident and resident; but, of course, very isolated cases, I will say that.

Q. When was the last nonresident that you

(Testimony of Oscar Anderson.)

know of who was discharged for disturbing the peace or fighting or assault and battery?

A. Well, not that required to have the Marshal come to the cannery, but that happen sometime that has been a little fist fight and so on, and that is about all.

Q. Well, about how long ago did that occur?

A. I think that twenty-nine was the last time that I know of that. [34]

Q. Ordinarily would disturbances of that kind be reported to you?

A. Well, that happened in the bunkhouse and it was just at the end of the season and so they were ready to go home.

Q. Well, you saw it yourself then?

A. Yes.

Q. Ordinarily when fist fights and assault and battery and other disturbances like that occur at other canneries, would reports be made to you?

A. That would be made to the delegate naturally if he didn't see it. But otherwise I will say that there is very little of that; that is very isolated cases which is apt to happen anywhere.

Q. Which are better fishermen, residents or non-residents? A. Anchorage?

Q. I say, which are better fishermen, residents or nonresidents, in Bristol Bay?

A. Well, it seems that the nonresidents holds the edge all right.

Q. A little edge? A. Yes.

(Testimony of Oscar Anderson.)

Q. Is the edge getting bigger or smaller?

A. Beg pardon?

Q. Is the edge getting bigger or smaller?

A. It is the nonresident seems to be a better fisherman. [35]

Q. My question was, is the difference between the resident and nonresident fishermen in the amount they catch getting wider or is it getting narrower as the years go by?

A. No; they are getting closer now.

Q. Closer and closer?

A. Yes. As a matter of fact we got some of the resident fishermen that is first-class fishermen, but then there are some poor ones that drag down the average, you know.

Q. What was the average? Can you name some averages, average catches at Bristol Bay for last year?

A. Last year was a very lean season, and I will say that I have the report that on Nushagak River there was only thirty-eight hundred average to a boat.

Q. Three thousand eight hundred fish average?

The Court: Is that fish or dollars?

Q. Fish. A. Yes; fish.

The Court: Well, but that is meaningless. You better explain it.

Q. At thirty-two cents apiece? A. Yes.

Q. The men share and share alike, two men on a boat? A. Yes; two men share alike.

(Testimony of Oscar Anderson.)

Q. That comes out to six hundred and eight dollars per man gross. Do you have any other average for other canneries? [36]

A. Yes, I have. Yes. The delegate gave a report of the averages at all the rivers.

Q. Do you have those with you?

A. No. I can just about give you roughly—it is supposed to be about seven thousand fish average on Kvichak River.

Q. The same price? A. Same price.

The Court: Now, wait a minute. This thirty-eight hundred, what section of Bristol Bay was that?

A. That would be Nushagak River.

The Court: Nushagak?

A. Yes. That is the second largest river there.

The Court: And for Kvichak, it was how much fish?

A. Seven thousand.

The Court: Well, how about the average over a number of years? I think that would be a better criterion.

A. Well, that is pretty hard to tell. Sometimes we have unusually good years and then not a very good year.

The Court: That is why it takes an average to make a criterion. Have you any figures, for instance, showing the average over not less than a ten-year period?

A. If you take it over an average of years, I

(Testimony of Oscar Anderson.)

would say that it should be in the neighborhood of something between fifteen and twenty thousand. That would be at least an average probably. [37]

The Court: Well, but what would the average be in money?

A. Oh, in money. Well, we have different fish prices. We negotiate a contract every year.

The Court: I realize that. That is why I asked for it in money; if you could give the average in money.

A. Well, if you take for the last ten years, we probably will say that twenty-five hundred dollars would be an average.

The Court: Is that the average per boat or the average per man?

A. Average per man. That includes run money and other extra earnings.

Q. That does not include the cost of transportation and board and room?

A. No. That is furnished free.

The Court: That is gross in other words?

A. Yes.

The Court: Well, what is the length of the season? Three weeks?

A. From the 25th of June to the 25th of July.

The Court: How long has it been that?

A. That has been, I think, since twenty-five when they set that regulation; 1925.

The Court: During this ten-year period that has been the season? [38]

(Testimony of Oscar Anderson.)

A. Oh, yes.

The Court: The 25th of June to the 25th of July?

A. Yes.

The Court: With two days off each week, is it?

A. Twenty-four hours closing period in the middle of the week, and thirty-six hours at the end of the week.

The Court: So it figures up about nineteen days then?

A. Yes—well, no. It averages up pretty much twenty-two and twenty-three days. Of course some of those days have not been full fishing days.

Q. Now that so many men are transported by airplane to Bristol Bay, can you tell us when they generally arrive?

A. About, if their agreement is consummated in time, they should arrive there about the 15th of June.

Q. That is for the nonresident fishermen and tendermen? A. Yes.

Q. When is there a substantial number of resident fishermen hired in Bristol Bay?

A. Well, they arrive just about the same time. However, you got resident fishermen living in the very district that they are put to work early in the spring to get the ways cleared up from ice and one thing and another ready to launch floating equipment.

Q. Early in the spring. You mean in April?

(Testimony of Oscar Anderson.)

A. Yes; when the weather starts to thaw.

Q. I believe you testified that the fall run work takes about ten days. That is loading the ships?

A. Yes, that is loading the ships; yes.

Q. Do the residents stay on working at any time after that?

A. Yes. They stay and take up the floating equipment and one thing and another, take it up on the ways.

Q. Now, with respect to Southeastern Alaska, are you able to state generally when the tendermen and trapmen from outside arrive in Southeastern Alaska?

A. Well, it all depends on the season there, too, when the season opens, but ordinarily they used to start to ship men in the middle of April.

Q. Well, it looks like our seasons are going to be opening about August 15th for several years.

A. Yes.

Q. Is your date of the middle of April still accurate?

A. No. Last year the bulk of the men were started, to ship them, about the first of May.

The Court: When was it you said the fishermen go to Bristol Bay or are sent up to Bristol Bay?

A. About the 15th of June.

The Court: The 15th of June.

A. Ten days before the opening there.

The Court: What do they do the ten days before the [40] opening of the season?

(Testimony of Oscar Anderson.)

A. They hang nets and get the nets ready.

The Court: Get the gear ready?

A. Yes. And also help unload the ships.

Q. Assuming that the fishing seasons will be closing in Southeastern Alaska somewhere around September 5th, as they appear to be for the past two years, when do the trapmen and tendermen leave Alaska?

A. As soon as they have the trap beached.

Q. Can you give us a date?

A. Well, just about, they should arrive in Seattle about the first of September, something like that, or latter part of August or something like that.

Q. My question was, assuming that our seasons will be closing for a few years, that we are now dealing with, about September 5th, when will the fishermen, when will the trapmen and tendermen leave—arrive in Seattle?

A. Well, I would say that, give a tender something about—it would be safe to say five or six days from Ketchikan to Seattle. Some make it faster of course; but it is just about that.

Q. How long does it take to beach the traps?

A. It all depends on how many traps a cannery has.

Q. You couldn't name a general figure then?

A. No, I couldn't, because the weather condition has a lot to [41] do with it, too.

Q. Well, would you say it takes maybe a week

(Testimony of Oscar Anderson.)

or two weeks for a cannery to clean up its gear and to get the traps beached?

A. Oh, yes, it takes that. It takes at least anyhow two weeks.

Q. Do resident trapmen and tendermen stay on and work after the nonresidents leave?

A. No; there is not so much of that. Of course there is odd jobs around the cannery, of course, if they want to work at that. No doubt there is work. There is always something to be done after the season.

Mr. Paul: I just want to check with the pleadings, your Honor.

Q. Are there any reports made to your union with regard to the number of cases pending before the Alaska Industrial Board; that is the Board that handles workmen's compensation claims?

A. Yes. They come to my attention now and then.

Q. That is in connection with the injury reports that are made? A. Yes.

Q. Do you know how many cases there have been pending before the Industrial Board?

A. No; I couldn't exactly tell you. There don't seem to be many accidents in the fishing industry.

Q. It has been your experience that there are not very many accidents? A. No, not many.

Q. Are you talking about both resident and non-resident fishermen in Bristol Bay?

A. Well, if a resident does not get benefit ac-

(Testimony of Oscar Anderson.)

cording to the act, why they mostly write to me and want me to take it up with the insurance company.

Q. I am talking about—you said there don't seem to be very many accidents in the fishing industry? A. No.

Q. You mean with respect to nonresident fishermen or all fishermen? A. All fishermen.

Q. Do you know of any members of your union—let's confine the question to nonresident fishermen members of your union—who have had to use the Commissioner of Labor in the collection of wages? A. No.

Q. Would those things ordinarily come to your attention if there were some trouble like that?

A. No, they seem to have paid up pretty well and, if there was anything of that, why it has been reported to me and I take it up with the industry.

Q. You just never have occasion to use him?

A. I never have. In my experience I have never had to use the Labor Commissioner.

Q. To collect wages? A. No.

Mr. Paul: I think that is all, your Honor.

Cross-Examination

By Mr. Dimond:

Q. Mr. Anderson, do any members of your union own property in the Territory of Alaska, homes or other property?

(Testimony of Oscar Anderson.)

A. Not that I know of. There could be in some single case that somebody had a piece of property.

Q. Most are up here temporarily?

A. Yes.

Q. And have their homes in the States?

A. Yes.

Q. What do the members of your union who fish in Bristol Bay do after they return to Seattle?

A. Fish along the coast, various fishing.

Q. How long do they fish? All year, would you say?

A. No. Some take in fall fishing in Puget Sound. When that is done, they go to California sardine fishing. This last year several took to shark fishing, too.

Q. How do the canneries determine which fishermen come up to Bristol Bay each year? Do they pick the best men? [44]

A. The superintendents want to see the fish records, what kind of fishermen they are.

Q. Therefore, they pick the men with the best records? A. The highest fishermen.

The Court: You mean the superintendent of each cannery?

A. Yes.

The Court: What do the other superintendents think of that? Don't they get a whack at it?

A. Yes; the superintendent for each cannery. When there are applicants, they inquire about their fishing records.

The Court: I thought they were all employed

(Testimony of Oscar Anderson.)

through the Salmon Industry. You don't mean to say that the superintendent of each cannery employs his own fishermen?

A. Yes.

The Court: How? What is the mechanics?

A. They go up and apply for it. They have to clear the union before they leave, but we haven't got the hiring hall.

The Court: You mean they can be a nonmember when they go to apply?

A. A nonmember naturally can inquire about the job and, if he has a job, however, they have to clear through our organization.

The Court: Clear for what purpose? For joining?

A. Joining. [45]

The Court: How do they find out their record if they are not members or haven't worked there before?

A. We have records to prove if they are a member.

The Court: How would he find out who were good fishermen if someone was not a member of your union and hadn't been there before?

A. In that case he would take a chance, inquire what other experience he got in the fishing industry, and he also probably was a man that has had a boat. The company assigns a boat to one man called the captain, and he may select a partner, too, and take him to the superintendent and say, "This

(Testimony of Oscar Anderson.)

is the man I would like to take with me this year."

Q. Mr. Anderson, you have testified, I believe, that the operators in Bristol Bay under a contract with the union pay the transportation of the men from Seattle to Bristol Bay? A. Yes.

Q. Have there been any cases where a nonresident fisherman belonging to your union has been in Alaska or wants to go to Anchorage after he finishes the season? Is he transported there or does he go to Seattle?

A. There may be reasons why a man for one reason or another had to go to Alaska or after the season was over in the States went to Alaska to work, particularly in the war years on defense projects, and then when the season opened [46] would go into the Bay.

Q. On his own?

A. No. We pay a man working in Alaska then. We pay the cost of transportation from the place that he is living wherever it may be. However, he cannot exceed the cost of a nonresident man from Seattle to Bristol Bay.

Q. How many nonresident fishermen members of your union apply for work in Bristol Bay each year who are here and would like to go up there?

A. Very few.

Q. Quite a few? A. Very few of that.

Q. You don't have very many fishermen who live in the States——

A. Come up here and then go into the Bay?

(Testimony of Oscar Anderson.)

Q. Yes. A. That would be very few.

Q. How many fishermen are in the Bay each year?

A. An ordinary season we—well, of course now that depends considerably on the regulation, how many boats the Fish & Wildlife think should be fishing in the Bay. Take a year like this, is a very sharp curtailment going to be, and I would say about one-third, or this coming season in Bristol Bay—

Q. I am not considering this but the past years. What is the average number of fishermen in Bristol Bay? [47]

A. I would say possibly sixteen hundred fishermen on the average.

Q. Would you say about half of those are non-resident fishermen? A. Yes.

Q. And the other half are residents?

A. Yes. It is probably fifty-fifty. Nushagak River has more residents than nonresidents.

Q. Did you testify that the baggage of your members is searched each year before coming to Alaska? A. Occasionally.

Q. And searched again before leaving for the States?

A. It used to be searched on the steamer going north.

Q. Have there been any cases of discovering illegal furs in the baggage of fishermen?

A. No. They are pretty good that way. No fur is being taken out. Too risky, I guess.

(Testimony of Oscar Anderson.)

Q. Mr. Anderson, I believe you testified, did you not, that some of the members of your union stopped at Yakutat on their way north to fish?

A. Yes.

Mr. Paul: I think that testimony was stricken, your Honor, and objection was sustained to that line.

The Court: Yes, I think I did sustain an objection to it other than to allow him to state that they stopped at [48] Yakutat at times. What is your question?

Mr. Williams: I was going to interpose, your Honor. I don't believe I objected to the question of them stopping at Yakutat. I think the court made some comment at that time as I recall the record. The record now shows that these men do stop at Yakutat sometimes. I think that is in the record.

The Court: The only thing I cut out, until, as I ruled, the development during the hearing might make it pertinent, are the causes of their stopping there and the details and the duration.

Q. Mr. Anderson, do the tender crews coming to Southeastern Alaska stop at the various towns as they come up to go fishing?

A. Yes. They call in at Ketchikan always when they come up.

Q. What other places do they call at?

A. What?

(Testimony of Oscar Anderson.)

Q. Do they call in at any other towns besides Ketchikan?

A. Yes. It all depends on where they are bound for. They may call in at Hoonah possibly, and it all depends on if there is anything they have to call in for, possibly engine trouble or one thing and another.

Mr. Dimond: I have nothing further.

Mr. Paul: Nothing further, your Honor.

The Court: Well, what about the—what do these tendermen and trapmen earn as an average during a fishing [49] season?

A. Just about fifteen hundred dollars; that is in Southeastern Alaska. To Kodiak and the Westward District and Cook Inlet they are on case percentage and that varies. Sometimes, well, I would say they probably will make two thousand dollars in a season if it is a good season. However, we have a provision in the agreement that if that wages does not come up to the Southeastern scale why then they will be paid according to the Southeastern agreement.

The Court: Well, it wouldn't be incorrect then to say that the average is, or that the pay averages, between fifteen hundred and two thousand dollars?

A. That would be pretty well, yes.

The Court: That is all.

A. Of course that is a longer season than in Bristol Bay.

(Testimony of Oscar Anderson.)

Redirect Examination

By Mr. Paul:

Q. Oh, say. I neglected on direct examination to ask you about Cook Inlet. If counsel has no objection I would like to make the same comparison I made before. With respect to your testimony about the arrival, departure, method of fishing, facilities furnished by canneries, that you have described about Bristol Bay, are the Industry practices and customs the same in Cook Inlet or different? [50] A. What is that?

Q. Is Cook Inlet fishing any different than Bristol Bay fishing?

A. Yes. In Cook Inlet you have traps, of course, some traps, and then you have hand traps.

Q. My question is confined to gill netting. Is that different?

A. They have set nets there, too, and now this later years and perhaps more so last year they started to drift in Cook Inlet. They never did drift gill net fishing in Cook Inlet before.

Q. Are there any nonresident fishermen your union has in Cook Inlet?

A. No. There is no nonresident fishing with gill nets in Cook Inlet.

Q. It is all resident fishing there?

A. Yes; and it is independent boats.

Q. What about Prince William Sound? Does your union have any members there?

(Testimony of Oscar Anderson.)

A. No. We have no members there. They have their Cordova Fisheries Union that have jurisdiction there.

Q. Cordova Fishermen's Union. Who issued the charter to them?

A. The International Fishermen and Allied Workers.

Q. That is what we call I.F.A.W.A.?

A. Yes. [51]

Q. The International Fishermen and Allied Workers of America? A. Yes.

Q. Who issued the charter to your union?

A. We have it from the International, too.

Q. I.F.A.W.A.—the same organization?

A. Yes.

Q. Do you know if there are any nonresident fishermen in Prince William Sound?

A. Yes. Just about half of them are nonresidents.

Q. And do the fishermen in Prince William Sound sell on the open market or to special companies?

A. No. They sell pretty much to special companies there, and it is independent gear. More than half is independent gear.

Q. Do the nonresidents have independent gear?

A. Yes.

Q. And also company gear?

A. And some company gear; yes.

Q. Well, now, do the employers ship in nonresident fishermen to Prince William Sound in much the same way as they do in Bristol Bay?

(Testimony of Oscar Anderson.)

A. No. The independent fishermen pay their own fare.

Q. No. I mean the ones who have company gear.

A. Well, the company gear—no. They pay their own way in, too, I understand. [52]

Q. In a sense all the non-resident fishermen are independent in Prince William Sound except that some of them go and get company gear?

A. Well, the majority of them are independent fishermen, but there is some that use company gear although it is a small percentage.

Mr. Paul: That is all.

Recross-Examination

By Mr. Dimond:

Q. I don't think I understand you. Did you say that there were no nonresidents in Cook Inlet or that there are?

A. Not of the gill net fishermen; they are all resident fishermen.

Q. They are all residents? A. Yes.

Q. Do you have any of your members in Cook Inlet at all? A. Yes.

Q. What kind of fishing do they engage in?

A. We have got salmon fishing and we have got—

Q. Well, outside of gill netting? You said there were no gill netters that belong to your union that

(Testimony of Oscar Anderson.)

are non-residents. What kind of fishing do they engage in then?

A. Well, we got traps there; trap and tendermen.

Q. Trap watchmen and tendermen? [53]

A. Yes.

Q. Are they all non-residents?

A. They are mostly, the biggest per cent of them are non-resident trap and tendermen, but the gill net fishermen there are resident fishermen.

Mr. Dimond: That is all.

Mr. Paul: That is all. Plaintiff rests, your Honor.

(Whereupon court recessed until 2:00 o'clock p.m., March 16, 1950, reconvening as per recess, with all parties present as heretofore; whereupon the hearing proceeded as follows:)

DEFENDANT'S CASE

THOMAS PARKE

called as a witness on behalf of the defendant, being first duly sworn, testified as follows on

Direct Examination

By Mr. Dimond:

Q. Will you state your name?

A. Thomas Parke.

Q. Where do you reside? A. Juneau.

(Testimony of Thomas Parke.)

Q. What is your occupation?

A. Special Deputy Enforcement Officer for the Department of Taxation.

Q. How long have you been engaged in this occupation?

A. Since 1946; a month after the department was originated. [54]

Q. Have you also been a fisherman?

A. No. I have never done commercial fishing.

Q. Will you explain in general your duties as Special Deputy Enforcement Officer of the Department of Taxation?

A. My duties are enforcement of the Territorial taxes and licenses and especially the fishermen's licenses.

Q. What do your duties with regard to fishermen's licenses consist of?

A. Well, the enforcement of the license tax which consists of supplying applications and seeing that the licenses are issued and the enforcement to see that the fishermen have licenses.

Q. What is the procedure in general for the collection of fishermen's licenses as it applies to both resident and nonresident fishermen?

A. Well, it is practically the same procedure as far as buying licenses, purchasing as far as the fishermen is concerned, but the enforcement is considerably different between resident and non-resident fishermen.

Q. Do you have agents located in any other ports of Alaska?

(Testimony of Thomas Parke.)

A. Yes, we do. We have agents in practically all fishing ports and fishing villages to make it possible for fishermen to receive licenses most any place, and we also have applications at practically any place we can leave them where they can easily secure a license—an application and [55] send in for a license.

Q. Do you have applications at the various canneries?

A. Yes. They have them at the canneries and all fish-buying scows.

Q. In your experience as a collection officer, enforcement officer, with regard to fishermen's licenses, have you run across any particular problem in the enforcement and collection of fishermen's license taxes with regard to resident trollers?

A. No. The resident trollers are a very simple matter, collecting licenses from them, because they are nearly all willing to pay. I should say ninety-nine per cent willing to pay. And as far as the enforcement end of it is concerned why, if they should happen to slip by during the season, you have got a chance of picking up the backward ones at their homes in the fall.

Q. When do most of them pay? Before they go fishing?

A. Before they go fishing; yes. In most of the Southeastern towns where most of the trolling is done, I am invited to their union meetings to be there a certain time when the meeting is over to

(Testimony of Thomas Parke.)

issue licenses, and the men are notified ahead that I will be there to issue them, and it saves them the bother, or if I am down in the harbor in the evenings—I have my own boat there and I am working on it in the evenings in the spring—why I set up an office there, [56] and the licenses are sold, and they come around looking for me. Right at this time why, if there were any that had missed it from last year from out of town or some place, they would be in to see me about it.

Q. Is the enforcement or collection of this license tax from non-resident trollers any different than with resident trollers? A. Yes, it is.

Q. It is different?

A. It is much more difficult due to the fact that they are here during the peak of the season and then they are gone, and if they are gone they are done for, and they come up here with the idea of nothing but making a profit, just the same as yourself if you were to go down to Washington.

Mr. Paul: I think, your Honor, he ought to demonstrate some familiarity with what is going on in their minds. It can't be established by a tax collector very well. I don't think he is qualified.

The Court: As I understand it, it is not a case of mental process. It is just the inference that you derive from someone coming up here fishing and leaving. That is not an unreasonable inference, but, of course, the inference perhaps, more properly speaking, belongs to the court rather than the witness.

(Testimony of Thomas Parke.)

Q. Will you explain to the Court then why there is a different [57] enforcement problem with non-resident trollers than with residents; what is the distinction between the residents and non-residents that makes an additional problem for you?

A. Well, as far as instances of evading it or would you want——

Q. Yes.

A. Well, we could state several instances where they have evaded. The big point with them all is to evade everything they possibly can up here. They bring up their supplies at the first of the season, practically everything they need, staples and gear, and are ready to go fishing, and there is no reason to come to a licensing town where we could check them, so it is a case of having to check them on the grounds. That means going out with a small boat or maybe in years to come it may be an airplane. You have to get in where they anchor in the evening, like, I will say, for instance Hoctaheen. In 1947, the first of July, I was anchored in that bay that evening checking boats. What I usually do is go into the bay fairly early in the evening before they start in and then check the boats as they come into the bay. And along about eight o'clock in the evening or so why one of the local boys came over who was equipped with a radio receiver and transmitter, and he heard a group of Bellingham boats that were out. If you are familiar with Hoctaheen, it is out on the ocean side of Yakobi Island

(Testimony of Thomas Parke.)

or the other side of Chichagof Island, [58] and these fellows talked back and forth. They have a code. At that time why "beans" was their code for locations, and they used "string beans," "backed beans," "pork and beans," and they meant different places, and the local boys had broken down part of their code, and this fellow had learned that they knew I was in the harbor so they agreed to fish until dark and go into a little bay about approximately two miles below Hoctaheen and anchor, and they were going in just at dark and with the understanding that I couldn't get in after dark, knowing I didn't know my way in through the rocks, and there was pretty good breakers that evening, and so I waited around until midnight and then took the skiff and outboard and went down and went into the bay, and sure enough there was seven Bellingham boats in there and one with nine men aboard, and there wasn't a license on any of them. They definitely evaded the tax as long as they could.

Q. Have you found it necessary to go out to the fishing areas to contact these non-resident boats?

A. Yes, it is necessary to go out. And you follow—the ordinary procedure is to follow the fish. At the time I had my boat rigged with a two-way radio. Before this I had to go by other fishermen that had radios reporting where the fish are. As soon as somebody catches fish why all the boats head for there. The non-residents, I should say.

(Testimony of Thomas Parke.)

The residents will, if they are fishing, if they are around Juneau for instance, why, and if there is a run up at Deer Harbor, why they will think twice before they will leave home to go out there for maybe a few days. But non-residents will take that off. They have no ties. Any district, they will take off and go there, and I make it a point to be there too. It is a case of the way the setup is and the amount of money that is appropriated for enforcement, why you have to spread pretty thin, so you have to keep on the move and create a hazard wherever you can, and we pick them up right along.

Q. Mr. Parke, have you ever compared the different types of boats; that is, between residents and non-residents?

A. Yes. Another thing, the non-resident fisherman's is far superior to the resident's due to the fact that the only boats that come up here are the first class ones and in good shape and pretty big boats, and they are all—you or I or nobody else would start out from Seattle with a hand-me-down motor—so therefore they are in first class shape when they come up here, and the minute they get here they can drop their lines in and go fishing. We have that type of boats here too, a few of them, but our average of boats is way down low because we have a lot of poor fishermen, as you know, that don't dare go over twenty miles from home, far enough that they can row back if they have to, [60] and therefore when they get out fishing why it is the bigger

(Testimony of Thomas Parke.)

and better boats that make the go of it, and when the weather gets rough why they are big enough and capable of taking it for hours out there when the little fellow and the average local fellow has to go into the harbor and anchor.

Q. Does the non-resident troller fish a different area from the resident troller, or the same area?

A. No. He will fish pretty much in the same area. It will depend on where the fish are. He will be where the fish are, while the resident troller—there are lots of men here in town that you all know that don't go over twenty miles from home here. Their equipment doesn't allow them to go and family ties and so on, so they would stay in fairly close, and they can't—therefore, the amount, the bulk of the fish would be up to the non-resident trollers.

Q. Do you have any way from a distance of distinguishing between resident and non-resident trolling boats?

A. Yes, we have—not necessarily the boats, but the licenses; we have. Ordinarily the boat has its home port hailing on it. But we have the license plates which we put in effect two years ago merely for enforcement which is a metal plate of different colors for residents and non-residents, and we require them to post them, this last year, on the star-board side of the boat, and you can tell from a [61] distance with binoculars whether he has a bright red one on or a green one which is a resident or non-resident.

(Testimony of Thomas Parke.)

Q. Do you know why that procedure was introduced?

A. Yes. We put that procedure in merely because the fish buyer would say, "Yes, this man is licensed. I saw his license." Well, the fellow would have a resident license, and I would be the only one, or somebody from the Department, that could check whether he was a resident or non-resident, and the boys right among him wouldn't know what kind of license he had. He wouldn't show it. While when you have the plate, he also has the license, but the plate is extra, and he has to post that plate on his boat and, if he posts a resident plate when he is a non-resident, why we usually get a supply of telegrams and so on right away from other boys who tell us about it, and we can run him down.

Q. Do resident boats spot the non-residents?

A. Yes. The residents report it right away. We have instances, several of them, like that. One for instance in Petersburg where local boys there reported three boats that had purchased resident licenses in Ketchikan, and they reported to the agent in Petersburg, and he reported it to me, and they were going to try to keep track of where they were and lost track of them, and the next report was from a resident fisherman at Tyee at Murder Cove, and that wired me here at Juneau on the radio down in the harbor [62] and told me that these three boats were there. Well, the wire went out on the same band as they were receiving on, and among them,

(Testimony of Thomas Parke.)

which the other fellows heard, they said, "Well, we are hot boats. Something has got to be done." So two of them left immediately. I left that same—I got it in the morning and I left that afternoon, and I got down there. The three of them were missing. I found out later that one had gone across to Gut Bay. It is across on the Baranof side. It is a little hole in the wall—and anchored, and the other two had left and gone to Sitka. These two went into Sitka and bought additional non-resident licenses, and so the outcome of it was they had two licenses all year, and the other fellow stayed low until I passed and went on down to the west coast of Prince of Wales. On the way back I surprised them there and I got this fellow. He practically gave himself up and come in and admitted he was wrong and he left twenty-five dollars with the cannery superintendent there for an extra license.

Q. Do you recall, Mr. Parke, any instance of collecting taxes from non-resident licenses in Kalinin Bay in June, 1948?

A. Yes. I was in there one night checking licenses. As the boats come in, it is kind of a little bottleneck getting in that bay, if you are acquainted with it, and I checked them as they come in, and our boat was down pretty far in [63] in the bay, and there was between eighty and ninety boats in there that evening, and three non-resident boats come in and pulled in, and you can usually tell who are friends there. One fellow anchors, and the others

(Testimony of Thomas Parke.)

tie to him, and there will be two or three boats there together, so I boarded these three boats, and they were all non-residents, and I asked them about licenses. Well, no, they didn't have them and kind of made a joke out of it. I said, "What do you think about the deal? Why haven't you?" "Well, we didn't think you would catch us and we figured we would duck you. If we had known you were in the bay, we would have gone some place else. Gosh, this is just about your time by here. Why if we missed it tonight, we probably would have missed you for good," and so on. So I said, "What do you think you should do about it?" "Well, I guess we will have to buy licenses." Well, it was handy to Sitka and a good location, so we sent them to Sitka and warned Sitka. They all plead guilty and received a fine of fifty dollars apiece out of it and got licenses, but if I hadn't gotten them and they had been in control where they would have known I was there, why we would never have seen them at all.

Q. How do these non-resident trollers keep track of you?

A. Ordinarily by radio control. It has gotten to be in the last few years, why the industry has modernized with [64] everything else, and they can keep ahead of me and practically tell every move that I make all summer long. I have lots of friends on the other hand that keep me posted too.

Q. Do you recall any similar instance in Craig in August of 1948?

(Testimony of Thomas Parke.)

A. Yes. There was another instance there. I was tied at the city float, if you are acquainted in the town of Craig, why the city float and the Union Oil, or the Standard Oil floats are about two hundred feet apart. I mean you have to go a couple blocks to get around from one to the other. I was on my boat and I just come out of the pilothouse and I noticed several boats taking on gas, oh, seiners and everything else, and naturally I looked for plates on every boat that showed up. I noticed these four boats with no plates on them. I got binoculars and examined them, and nothing showed, and so I went up on the dock and I went around and, when they tied up for gas, I expected to check them and see them. They can come up right to the face of the dock practically, and by that time one of them spotted my boat, and they talked back and forth. He backed up and two of them tied together, got up where they could talk back and forth a little bit, and then turned around and pulled out of the harbor and left and headed south, and this was along in the latter part of the season, [65] and they were on their way south. So I had a little business I was taking care of in town, and it took me about twenty minutes to finish up. By the time I got started they had a half-hour start on me. I went from there to Waterfall, and by the time I got there the oil station attendant there told me, he said, "There were some boats not looking for you here." He said, "There were four boats filled up with gas,

(Testimony of Thomas Parke.)

and had filled with gas and said they were being chased, to hurry up. They wanted to get out of the Territory, and they were on their way south, and they gassed there instead of Craig and took right on." And they were only about five hours from the border, and I checked at Hydaburg, and they hadn't appeared there at all, so apparently they went outside the island there at Hydaburg and took right on across the gulf. That evening they probably anchored in at the mouth and took off at daylight in the morning for Dixon Entrance. That is four more that is a thing of the past.

Q. Mr. Parke, have there been any instances where non-resident fishermen have bought resident licenses?

A. Yes; that happens right along. In fact we have about thirty-one names right now that we are investigating now because they have been reported fishing with resident licenses when they are non-residents, when they purchased them. [66]

Q. Based on your experience, as you related just now, in collecting taxes from non-resident fishermen, do you believe that there is any other way of collecting the tax, enforcing the tax against non-residents, instead of going out in the area itself?

A. It is about the only way under the set-up of the laws and so on, why you can't leave it to them to send in. It is abused so much, and the only way is to go out on the grounds and see. After all they don't have to clear customs when they come up here.

(Testimony of Thomas Parke.)

Q. Would that procedure be necessary for resident trollers?

A. Why, no. I could check every troller that trolled here last winter by going to every little town in a matter of two weeks here in Southeastern, and I could check every troller in the country.

Q. Is there any—leaving the trollers for a moment—is there any particular problem in the enforcement and collection of the tax on resident gill netters outside of Bristol Bay?

A. No. That doesn't amount to—it is not much of an industry otherwise, not much of a phase of fishing, I should say. Ordinarily, like the Taku which has quit money making in so long, that it ordinarily consists of resident boys from the local towns. There is Haines, and the boys come down here and come in and buy their licenses right off. I usually go up there to check on the gear licenses and so on, and everybody knows the other fellow there, and they take care of it, and the same way at Yakutat among the native fishermen who fish the Situk and Akwe and those rivers.

Q. Is there any particular problem with non-resident gill-netters outside of Bristol Bay?

A. Well, you do; yes. You will have them coming in. But what ordinarily happens is a non-resident will come in and he may be a fisherman at heart or may be a bass fisherman and, if there has been any in Juneau here this last summer when the run happened to be heavy at Taku, why he would

(Testimony of Thomas Parke.)

have been right out there fishing and grab the peak of the fishing, and it is a short season, and in a matter of a week or two why the season would be over and he would be out of it and be gone, and you just can't keep up, and you have other areas where, oh, around Dangerous River and Italio and Situck, Ahinklin and up in the Alsek River you have the flying fish out of there the last few years, and a new phase of it, they work their equipment way up the rivers and then fly their fish out, and you have one or two operators with a plane flying the fish out, and you will have a few good fishermen.

Q. Well, do those men pay their license tax?

A. No. You have to go in after them and which is a considerable [68] expense, and about the only way to get in there is to fly in and check. You don't know who is there until you do go to the expense of going in after them.

Q. Is there any particular problem with non-resident gill-net operators in the Cook Inlet area?

A. Yes; the same way. The licenses are abused up there, and considerable, lots of them are giving, oh, Anchorage, Palmer and Homer as their addresses. Lots of the construction workers up around Anchorage are out and they just consider themselves a resident and buy licenses and fish there, and when the season is over they are gone, and there is no record of who they are or where they come from at all. You start looking back on some of those records in some of the towns they come from and inquire

(Testimony of Thomas Parke.)

about them, and they never heard about them at all.

Q. How are the licenses collected from both resident and non-resident gill-netters in Bristol Bay?

A. Most of that is taken care of through the canneries. It is in their contract. Practically all the fishermen there are contract fishermen that sign up with the cannery and use the cannery gear, and it is usually deducted ordinarily from their pay.

Q. Well, do the canneries remit to you that money for the licenses?

A. Yes. It is held there. The precedent was started years [69] before we were ever in existence of going through the cannery and collecting, and we find that that is the only logical way of doing it.

Q. Why do you have to go to the cannery instead of letting the cannery send the money in?

A. Well, it just gets abused so much that just in getting it by far pays the expense of going in there to get what is not sent in.

Q. Will you explain why, if you know why?

A. Well, yes. Where fishermen that are just there part time and some of them will quit and go out and so on, and there are a few instances where there is quite a little—where the season is shortened, where the Fish & Wildlife curtailed the season. Therefore, in order to cut down why instead of cutting down the dates they cut off the amount of gear, and that means the poorest man quits fishing. It is known and, I believe, agreed among the unions in the contract with the cannery that, if there is to

(Testimony of Thomas Parke.)

be any curtailment, why then the poorest fisherman is laid off first. Therefore, naturally they keep the best fishermen they could. So maybe the Fish & Wildlife will lay off so much gear, and that means that so many boats have to be laid off at each cannery. One cannery will have to lay off three and another one four and maybe another one eight boats. This is in the middle of the season and, if we are not right there, why they lay off eight boats and send sixteen men home, and when I come to get the applications why if they were left to be sent in, why those would be just omitted.

Q. They don't deduct from everyone?

A. They just won't deduct; they just turn it back. Where it goes, whether the fishermen gets it back, or not, I don't know. But we do know what we have to do in that case is go in and check on how many boats they started fishing with in the season and, if they have curtailed, we can find that out before we go in the area. Ordinarily we can pick up on the dock how many boats they have tied up and, if they tied up four boats, that means there are eight more fishermen. At a glance I can tell how many boats they have got now. I can check on how many are fishing at the time and how many are tied up, and it pays by far to go after them.

Q. Now, these men who are laid off and sent home, as you say, are they both resident and non-resident fishermen?

A. I believe they are from both classes. I

(Testimony of Thomas Parke.)

couldn't say for sure whether they lay off evenly in both or not, but I do know of non-residents that were curtailed.

Q. Regarding the resident fishermen that might be laid off, do you then miss the collection of their license tax along with the non-residents? [71]

A. Well, no. Ordinarily that comes up—ordinarily the resident will want his license anyway, the ones up there, the big share of the natives and, say, residents of the watershed. You see in order to have a stake-net on the shore they must live in the watershed for three years. Therefore, most of them do a little fall fishing, too. There are a few mild-cure plants and so on where they buy, and they require the license, and then the residents that go into the bay to fish, fish the boats, are ordinarily fishermen that they will either fish seines down here before, or trollers, or naturally fishermen at heart, and they will want their license for other deals, and lots of them have their licenses before they ever go up there at all, either buy their license here, either for fishing or have it ready for fishing.

Q. Now, did the Department of Taxation collect licenses for all the fishermen in Bristol Bay for 1949?

A. No; it didn't. We have still approximately one hundred and twenty that are still pending during, I should say, a compromise. They refused to pay. That was among the tendermen and of the, well the tender, what would be tender crews on the boats that bring in the fish. They had considerable

(Testimony of Thomas Parke.)

trouble the whole way through up there this year on that, and the fishermen had agreed to pay under protest, but the tendermen refused to, and we ended up, what it turned out to be was going to be a case of tying up the industry. We tried to arrest, pick out one fellow at Dillingham, and what we would have had was everyone was going to quit right then. The pack was ready to go out, and the steamer was out in front ready to take it, and so what we ended up doing was accepting a guarantee from the cannery with the signature for all the men and the cannery would guarantee to hold this money until it was settled in court.

Q. You don't have the money yet?

A. No; we don't have the money, but we do have a guarantee from the cannery if the case goes through.

Q. Are trap watchmen residents and non-residents?

A. Yes, they are. I would say the majority would be nonresidents.

Q. Have you had any particular difficulty in the enforcement of the license tax law against the resident trap watchmen?

A. No, we don't. Ordinarily the fellows that either troll or something else the first of the season pay up, and that is all. They are willing to pay it.

Q. How about the non-resident trappers?

A. Well, you have quite a problem there again.

Q. Will you explain what that is?

A. Well, ordinarily throughout Southeastern

(Testimony of Thomas Parke.)

Alaska, I believe all over, there is an agreement with the canneries that [73] the canneries will pay for the man's trap license—for the trap watchman's fisherman's license—and well, what happens in that case is they just don't report on the traps. It may be that "X" cannery out here has eight traps. Well, we go around to collect from them, from the cannery, and there will be, well—it depends. Some of them have one and some have two watchmen on it. Maybe they will pay all right for them. But maybe John Jones, who owns a private trap which is under contract to the cannery and which the cannery supplies and it takes the fish out of it, well, he won't have a license and, if you are not right out there to check on how many traps they are brailing, well, we will miss out on probably two more licenses on each of those cases.

Q. Do you recall any instance particularly regarding the enforcement procedure against non-resident trap watchmen in Chatham Straits in August, 1948?

A. Yes. We have a deal there, similar to that where one of the canneries had all the applications made up and settled for, and I talked to the—oh, the tally men ordinarily come up and have been at the job long enough to know where to start looking for that, and ordinarily you go up on the dock and kind of talk to everybody you see along there about the weather and so on and how many traps you have and how many fish are coming out of this one

(Testimony of Thomas Parke.)

and that one, [74] and the outcome of it is you get a pretty good picture before you ever get to the office. In this case why there was nineteen trap watchmen licensed and tendermen and so on, and then when, by the time I got to checking over we got the score up to twenty-eight. Twenty-eight, it should have been, and nineteen were turned in.

Q. Were those additional men residents or non-residents?

A. Non-residents all the way through.

Q. Now, Mr. Parke——

A. I might add that in Bristol Bay in the collection up there among the scowmen and tendermen all the residents are, except one—there was one that would have been except his name came in late and they withheld five dollars for him—but outside of that all the resident tendermen are all licensed. They bought licenses. They were all right. They wouldn't squawk at all. They wouldn't put up any argument. They paid it. But the non-residents are all contesting it.

Q. Mr. Parke, going back to Bristol Bay for a moment, do you know whether the average resident and non-resident fishermen, which is higher in Bristol Bay? A. Non-resident.

Mr. Paul: I don't believe the witness ought to be allowed to answer that, your Honor. There is no testimony that he made any investigation at all of averages. [75]

Mr. Dimond: He goes in Bristol Bay every year

(Testimony of Thomas Parke.)

and around the canneries and sees the tally sheets.

Mr. Paul: Let him say so first.

The Court: If he says he knows, he can testify, and you can cross-examine on the source of knowledge. He doesn't have to first disclose all his sources of knowledge. If he knows, he may answer.

A. What was the question again?

Q. Do you know whether the resident or non-resident average is higher at Bristol Bay regarding catching fish?

A. The catch of fish from what I have learned to believe and from looking on their score boards, it would be the non-resident that would be highest. You kind of watch those as you go along, and that is common talk throughout the bay, and you will have boat number so and so and so and so high and have residents on one side and non-residents on the other, and as a whole the non-resident turned out there.

Q. Going now to the business of seining, do you have any particular enforcement problem with resident seiners in Alaska?

A. No, not to amount to anything. They are just practically the same as all the other fishermen. They are local boys, and we know who has fished and who hasn't fished and, if they try to sneak by, why you know right where to put your finger on them and, if they happen to sneak out of port [76] without a license, you know where to get them when they come back.

(Testimony of Thomas Parke.)

Q. Is there any particular enforcement problem with non-resident seiners?

A. Well, yes; the same as some of the rest of them. They are up here with the one intention of making money and getting out and, if they can get out without a license, it is to their advantage, and——

Q. Do they contract with the canneries to sell?

A. Part of them do in some areas and—I should say in all areas part of them do. There are so many free-lance boats that sell here and there that don't tie with any. That is more general among the non-resident than the residents. Most of the residents are fellows that are broke right now and they have to tie up with a machine shop or cannery or somebody to finance them to get started.

Q. How do you find out whether or not a non-resident seiner has purchased a license?

A. They use the plate system in Southeastern Alaska, the same as——

Q. I mean where have you seen them to find out? On the grounds?

A. Ordinarily I have to check them on the grounds.

Q. While they are fishing?

A. Well, that is quite a problem, of trying to catch a seiner [77] due to the fact that he is either stopped watching a school of fish or trying to purse them, or else he is running, which is usually about the size of it. And in Southeastern we have it pretty well controlled by using plates. If there are six

(Testimony of Thomas Parke.)

men on the boat and you see six plates, why you can sneak off and not bother them at all. But in other areas it is a considerable problem. We would have to have boats in Prince William Sound and Cook Inlet and around Kodiak, and that would have to be considerably more boats than we could afford to put on for the job.

Q. Do you stop the seiner while he is pursing or watching for fish?

A. No. You don't dare to do it because you could scare away a thousand fish there, and maybe he is completely in the right.

Q. Then if you want to board his boat and check his license, where would you stop?

A. The only place to catch him would be at a marine station or a cannery or a fish-buying scow. Take these fellows who jump around, why it is an awful problem to try to keep up with them.

The Court: You mean that they might have a license even though they have no plate?

A. In the northern area. The plates are only used in Southeastern Alaska. It is really for enforcement, and it has [78] been a problem to try to build up to the place where we could enforce it even if they have plates on so we could check.

Q. Is there any difference in the enforcement procedure in northern Alaska for seine boats as compared with Southeastern Alaska?

A. Well, yes. That is, where it would amount to—down here we have a chance of running around

(Testimony of Thomas Parke.)

with the boat and checking them on the grounds, and you can find if there is a run, and once in a while at Anan Bay they would all be there and get their fish there instead of if they were contracted with, say, the Hoonah cannery, and those boys would have to make arrangements to go down there, and they would have their buyer there to pick up the fish, while the free-lance non-resident has no ties with any cannery or any company up here and he loads up with fish and he sells to the first fellow on the grounds and goes after more fish and sells to somebody else the next time that would show up to take them.

Q. Have you formed an opinion as to whether or not it would be necessary to go out in the fishing areas and check for licenses if only resident fishermen were engaged in fishing in Alaska?

A. Yes. That would be fairly easy to do.

Q. Would it be necessary to go through this enforcement procedure? [79]

A. No, it wouldn't. It might be a case of giving them a good checking down here on the dock once in a while. As it is, we have agents set up in each of these little towns. You take our agent at Craig; he knows every fisherman in town, and when they go out in the spring if they sneak out, why they have to come back in the fall, their family is there, and they would pick up their license then, and there would be no reason for it.

Q. Have you formed an opinion as to whether

(Testimony of Thomas Parke.)

it is more difficult to enforce this license tax against non-resident fishermen as compared with resident fishermen?

A. By far; yes. At least ninety per cent of the work would be with the non-resident.

Mr. Dimond: That is all.

Cross-Examination

By Mr. Paul:

Q. Mr. Parke, are there any other special deputy and enforcement officers like you?

A. Not completely in my capacity, although we have a man set up at Anchorage. We have a new man there this year which will be broke into the same capacity as I have here.

Q. Will he do anything specially? Fishermen?

A. He will; yes. [80]

Q. And travel around like you do?

A. Yes. He is supposed to go into the bay with me this summer, around Kodiak area and get acquainted with it, and break him in to doing the same work.

Q. Then you won't have to go up into Bristol Bay?

A. Well, I am hoping not. But I think we can get a man that is efficient up there to check that area, and we can concentrate more on these other areas.

Q. He will be taking care of Bristol Bay, Cook Inlet, Prince William Sound?

(Testimony of Thomas Parke.)

A. Well, as we have it mapped out right now, we will have him take care after this year of Bristol Bay and Kodiak, and I will half the time take care of Cook Inlet and Prince William Sound. We have Cook Inlet; as you know, it has been a wild year up there last year, and it will be the same thing this year.

Q. What kind of a year?

A. I should say a wild year. It is a very good season by a new type of fishing, drift nets, as Mr. Anderson explained. It got started and the men made lots of money last year, the fishermen, and that means there will be lots more of them there this year.

Q. Now, you don't mean to indicate to the court that, if there were no non-resident fishermen here, that you would not have a job any more as special deputy and enforcement [81] officer? You don't mean to indicate that here?

A. No. As far as if there were no non-resident fishermen here, why it would be just a case of——

Q. I am asking you about your job. You would still have to occupy this position in order to collect fishermen's taxes?

A. I would occupy it just about as much as my capacity as drivers' licenses would be, I would say. I issue drivers' licenses through the office there and out of the office and go out here to any of these outlying towns and issue drivers' licenses. It would amount to about the same capacity. You know

(Testimony of Thomas Parke.)

yourself, drivers' licenses in a town like this, you have to put on a campaign every once in a while to see that everybody—and check them all—and see that they have licenses, and that is about what it would amount to as far as the fishermen are concerned. I don't think there would be any more evasion of it than there is with the drivers' licenses then.

Q. Now, these agents you have at all these points, where did you say they were? They were at all ports?

A. Practically. It depends on how small you would call ports.

Q. What about Elfin Cove? There are a few people live there and they have a fishing station.

A. Yes; there is an agent there also; Elfin Cove. And there is one at Pelican and Sitka, Port Alexander, Tyee.

Q. Kalinin Bay? [82]

A. No; there is none at Kalinin Bay. It is so close to Sitka there and, if there were enough call for it, we would. We usually figure the amount of demand there is for a license.

Q. Well, the trollers who get their fish around Kalinin Bay sell fish at Sitka, don't they?

A. No. They usually sell them at Kalinin Bay. It depends. The big ones ice, that is the non-resident boats, or a lot of them ice fish in that area. They take ice from Sitka ordinarily through an agreement from——

(Testimony of Thomas Parke.)

Q. You have an agent at Sitka, don't you?

A. Yes.

Q. Well, these agents, do they have enforcement powers or just pass out blanks?

A. No. They have enforcement powers to the extent—what we usually do is give them power to check boats. They go down and go through the boats in the harbor, watch them come in and out.

Q. Do you know any place in Southeastern Alaska where it is possible to sell your fish or complete the cycle of the operation by icing where you don't have an agent?

A. No, I don't. You would have a cycle there without icing.

Q. Let me see if I am mistaking the record and so you understand me. A troller will come in to a place and get ice and go out fishing and put the fish on ice and come back [83] and unload perhaps at a different place, unload his fish. Then it is necessary to go get some fresh ice. He can either get it at the same place where he unloads his fish or maybe, like the Kalinin situation, he has to go to Sitka to get ice. That is what I mean by a complete cycle.

A. That is only part of the fishermen. Nowadays it is more modern than it was. The big share of them, the competition is getting so thick among fish buyers, that very few of them ice any more. They will get probably a cent, maybe two cents a pound more for bringing their fish direct to, well

(Testimony of Thomas Parke.)

say, they bring them in here to the cold storage rather than sell them to a buyer out on the grounds. What they will do is probably out here at Funter Bay, why the cold storage will have somebody buying fish for them out there at a price probably two cents below what it would be here in town.

Q. You mean some trollers don't use ice?

A. Very few of them use ice; yes. I would say probably twenty per cent.

Q. In other words the fish are picked up by the mobile fish buyers so rapidly that they don't have to have ice?

A. Twice a day, most of them; sometimes three times a day. Practically every harbor out here has a fish-buying stand. Well, there is Elfin Cove, and you have got Soapstone and Bingham and Hoctaheen and Greentop and Deer Harbor, Sawmill [84] Cove, Klag Bay. There's buyers in every one of those grounds. Wherever there is a boat anchored at night, why there will be buyers there usually. The competition is getting so strong for those fish.

Q. How many non-resident trollers are there come to Southeastern Alaska every year?

A. We can't give a figure right off because one license covers everything. You can buy a license right now for digging clams, and that is good for trolling the rest of the year. Right now we are selling licenses up at Cook Inlet, and they are digging clams on that license, and in the summer they will be——

(Testimony of Thomas Parke.)

Q. I just want to know, Mr. Parke, if you know how many non-resident trollers come to Alaska?

A. Offhand; no.

Q. How many non-resident purse seiners come to Alaska? Is that in the same category? You have no way of learning from your records?

A. No. It is not kept that way, but possibly the Fish & Wildlife could give you the figures on how many seine boats and so on, but so far as our license is concerned, why one license covers all operations.

Q. You mentioned in your direct testimony three boats had been reported and currently you weren't able to catch up with them. How many men does that involve? [85]

A. That was three in that case; one-man trollers.

Q. Now, the Kalinin Bay situation, three more non-resident boats that resulted in a fifty-dollar fine. How many men?

A. That is three again. Ordinarily there is one man to a troller.

Q. Now in the Craig business, four boats, 1948. Do you know how many men were involved there?

A. I would say four. It is possible there may have been another man below on one of those boats. Once in a while there will be two men, but ordinarily one-man boats.

Q. At Hoctaheen that involved nine men?

A. Yes.

Q. What year was that? A. 1947.

(Testimony of Thomas Parke.)

Q. Before this tax became effective?

A. Well, it was the other tax that was in effect, the twenty-five dollar. I don't believe it would make any difference if it was still a dollar and a half.

Q. I am just interested in fixing the time; that is all; Mr. Parke. Now, you have thirty-one cases that are being investigated now of non-residents, possibly non-residents, who bought resident licenses?

A. It is possible, yes. I wouldn't say; we are not sure of it until they are proven that way. But they have been reported that way, and it is very possible. [86]

Q. Is something on the license application itself that indicates that?

A. Yes. They are signed under——

Q. Suspicious circumstances?

A. Perjury. Well, no. Some are picked up that way, but ordinarily it is being reported by residents.

Q. Kind of a competition?

A. Yes. There is very much competition.

Q. The residents report on the non-residents?

A. Yes.

Q. And vice versa?

A. The biggest part of my enforcement, the help is from the residents. They keep track of them. You will have a good friend among them but, if he steps out of line, why they report him right off.

(Testimony of Thomas Parke.)

Q. Then your experience is somewhat like Mr. Anderson's here. The residents help fishery law enforcement out in Bristol Bay?

A. I had a case in Bristol Bay——

Q. And violation of the liquor laws up in Bristol Bay?

Mr. Dimond: I object, your Honor. There is no point to counsel's remark.

The Court: It is kind of conversation rather than examination.

Mr. Paul: I would like to draw an inference, too. [87] It seems, your Honor, that everybody seems to enforce the law except——

Q. Now, Mr. Parke, you have prepared yourself as well as you could to testify here, didn't you? I mean, you haven't gone into extensive research of your records?

A. No; I haven't gone into extensive research. I read over my logs and reports and so on.

Q. Did you ever have occasion to go over any telegrams and reports made about the number of non-residents, certain non-residents, not having proper licenses or any licenses?

A. Yes. We have telegrams. I will say on this deal at Petersburg we have telegrams and letters to the effect——

Q. Are you able to make any estimate from what information you believe is reliable on the number of non-resident trollers who have not bought licenses or bought improper licenses?

(Testimony of Thomas Parke.)

A. Well, no, I wouldn't be prepared to say that. After all that is supposed to be my job. I should say one hundred per cent licensed. It is my job to see that, and it would be a slap in the face if I didn't say that.

Q. Do you want to say it is one hundred per cent now?

A. No, I wouldn't say it is one hundred per cent due to the fact that there is some—there is more on the seine boats.

Q. On trollers, first?

A. Well, on the trollers, I wouldn't give a figure as to how [88] many were without. I hear reports from different places and run them down, and some are fairly authentic, and again some that are not. You will hear that there are a dozen boats, and I made one trip out to Deer Harbor one time especially, and there were supposed to be a lot of boats out there without a license. Well, they pulled a fast one and were ducking the residents to try to prove it. When I got out and ran them down, why they were licensed. But a big share of the deals are authentic when they are reported.

Q. Well, let's go over to the non-resident purse seiners then. Is that somewhat the same situation as the trollers?

A. We have another problem there. It comes up in the spring of the year. We have records. I can't give the date exact, but it was in the early spring. I was going north out of, through Peters-

(Testimony of Thomas Parke.)

burg, through the Narrows one afternoon when they were coming north, and we have other deals, several of them, out around Elfin Cove.

Q. I didn't want to go into the reasons for your difficulties any more than I have to. All I am asking now is, from the information you have, can you form any reliable estimate, or from the reliable information you have can you form any estimate as to the probable number of non-resident purse seiners who bought improper licenses or none at all?

A. Why, no. Our figures would show—well, they have thirty-one [89] down there now that haven't.

Q. We have mentioned the thirty-one.

A. And we see them going north in the spring, and they don't need a license, and they are on their way up; they are going up to Prince William Sound; and in the fall they come back down. They have fish scales on their boats and still no licenses. They are not fishing either time.

The Court: What do you mean—they don't need a license when they go up?

A. Well, the law doesn't require them to have licenses until they are fishing, and they aren't fishing.

The Court: Well, if they are going up to fish, it seems to me they are engaged in fishing.

A. The intent is that it should be, but we haven't been able to enforce it to the extent that they still could be taking that boat north and putting somebody else on to fish it.

(Testimony of Thomas Parke.)

The Court: My point is that any boat that is operated up here for the purpose of fishing is engaged in fishing even when it is on the way up through Alaska waters.

A. It seems like it should be the law, but we haven't been able to do anything until they engaged in commercial fishing. After all they can go out here and fish for their own use without a license. The intent of it, I believe, is that. The outcome is they go north and come south. [90]

Q. You mean your agent or you at Petersburg watch these boats go by and don't do anything about it?

A. Well, no, we can't. There are a lot of boats that do go north but they put a reliable man on as a skipper to take the boat north, and they may fly him back.

Q. Did you ever try to do anything about it through the District Attorney or Attorney General?

A. We have tried to, and they have told us that when they were fishing they would buy licenses and not until then.

Q. When was this that you got such an opinion?

A. Well, from the fishermen. I was told that in Pelican one time there. The fellows were taking off, and they group up there, usually eight or ten. They will start for the south and——

Q. When was it that you got this opinion from the Attorney General that a man was not engaged in fishing when he was approaching the fishing grounds?

(Testimony of Thomas Parke.)

A. Well, the law reads—engaged in fishing.

Q. You didn't get an opinion from the Attorney General then or from any District Attorney.

A. I can't say offhand. They are my instructions, and I carried them out. I don't know where the opinion came from. You can take it up with Mr. Mullaney probably.

The Court: Well, it seems to me like the law itself is deficient in not defining fishing properly. It requires [91] actual engaging in fishing operations; that is in catching fish instead of engaging in some activity connected therewith.

Q. You were up in Bristol Bay last year, were you, Mr. Parke? A. Yes, I was.

Q. How many canneries did you see where there were two averages?

A. Three at least that I know of.

Q. Three out of fifteen?

A. You hear the talk every place, but I remember of looking at the scoreboards at Diamond J and Bristol Bay Packing Company and N & N, that is Alaska Packers, and presumably they are at each one. They all talked about who was high man and who was high resident and who was high non-resident. I think we have a high resident man in town here.

Q. Well, that was enforced several years ago but not last year?

A. Last year it was on the scoreboard.

Q. Just one average now?

(Testimony of Thomas Parke.)

A. Two different averages is what showed at Diamond J last summer. In fact, I couldn't say, but it is possible I have a picture of it. We have a picture of the operations there, and the board is right out on the front of the cannery where they are putting up the new building.

Q. What are these part-time Bristol Bay gill-netters? A. What was that? [92]

Q. I said, what are these part-time Bristol Bay gill-netters?

A. Men that come in there and, oh, there may be a webman, and somebody gets sick or goes home or every once in a while generally among that crowd of people there will always be somebody that has a death in the family or something of that sort, and he will pick up and leave, and they will put another man on, or another man will be sick for a few days. We have one instance come up right now where two fellows fished part time up there while the men were off, and the license was evaded.

Q. Residents or non-residents?

A. Non-residents, both of them.

Q. The company didn't collect the tax?

A. No, didn't collect it; no; didn't hold it out. The application was held out and the license was issued and when I was to settle with them and collect for that why it was voided.

Q. That was a mistake on the cannery's part?

A. I don't know whether it was a mistake on the cannery's part. They voided the license after it

(Testimony of Thomas Parke.)

was issued, and turned back, and said, "Why no, this man didn't fish. He doesn't need a license." And that license was voided, and since the investigation we found that that man did fish under an affidavit of his, and also he settled.

Q. The non-resident fisherman, he was fully co-operative; it [93] was the cannery?

A. The cannery in that case; yes. In his affidavit he claims that he had been deducted.

Q. What are the part-time fishermen?

A. In Bristol Bay?

Q. Among the non-residents?

A. It would be that and where the season is cut short and they are taken off.

Q. Now, just how many times has the season been cut short?

A. Well, the Fish & Wildlife could probably give you definite figures on that.

Q. Well, what do you know?

A. In forty-six they cut off a considerable number of boats.

Q. We are talking about curtailment of the season, not the boats.

A. Well, what happened, they curtailed the webbing and the amount of fish they take, is all they curtail. If the escapement isn't as much as they think it should be, why they say, "We have to cut down somewhere."

Q. Yes; I understand that. I want to know what this curtailment of the length of the season is.

(Testimony of Thomas Parke.)

A. Not the length of the season; it is the amount of web that is allowed in the water.

Q. That is curtailment of gear. Then we are agreed on this. There has been no curtailment of the length of any season [94] in recent years?

A. Why no.

Q. That you know of?

A. The season is cut off about three or four days short this year. On the Nushagak area, I couldn't say exactly, but it was a matter of a few days anyway that were cut off.

Q. And that three or four days that was cut off the length of the season, did that result in any difficulty with tax collection through the cannery?

A. Well, yes. Well, a case like that where they cut the season completely off, it wouldn't. There are men that are full-time fishermen there. But if they cut off part of it, where they cut off boats earlier, and the gear——

Q. We will get to the boats and the gear later on. But I am talking about the difficulty in collection of taxes where the length of the season has been curtailed by three or four days. Is there any such difficulty?

A. No; outside of a big powwow among the fishermen. They would, if they are getting gypped at all, they will holler that they didn't get a full season's fishing out of the amount of the license.

The Court: Well, how about your time? Doesn't a shortening of the time for fishing also shorten your time for collection?

(Testimony of Thomas Parke.)

A. Well, yes; it does. I spent considerable money up there [95] this summer just because of the shortness of the season in order to get around up there. I couldn't wait. Ordinarily I could take tenders and make the rounds and so on and wait until there was a crowd so we could charter a plane, but the season was so short that you would have to make these deals right away, and it cost the Territory a lot of money.

Q. We understand that. You remember one occasion where the season was cut down three or four days. Now, are there any other instances that you know of where the season was cut down?

A. I couldn't say. I do know that it is probably agreed ahead of time.

Q. I just want to know if you know of any instances where it was; not what might or how it was cut down.

A. Well, in the Bering Sea alone, and Bristol Bay?

Q. And Bristol Bay.

A. Well, this year one instance——

The Court: You have already testified to that, haven't you? There is no use of going over it again.

Q. Any other instances?

The Court: If it was cut down anywhere else in the Territory outside of Bristol Bay, you may testify to that.

A. Well, I wouldn't say any other time offhand.

Q. Let's get over to the curtailment of the

(Testimony of Thomas Parke.)

amount of gear. [96] Does that result in part-time fishermen in the middle of the season?

A. Well, it will be a full-time fisherman, but if they lay off and curtail the gear the poorest man goes home first, and that means you are curtailing fishing.

Q. When was the gear curtailed that you know of? A. In forty-six.

Q. In the middle of the season?

A. Along probably over beyond the middle of the season all right.

Q. Where else during the season?

A. Well, they figure——

Q. I mean, what other year during the season?

A. I wouldn't be able to tell you offhand, but I do know in forty-six that they curtailed the gear and to the extent——

Q. Were you in Alaska before 1946 when you took this job of enforcement officer?

A. Yes, I was.

Q. Was there any way of your learning of the history of Bristol Bay for the past ten years?

A. No, there wasn't. I didn't. I heard of Bristol Bay, but I had nothing of any interest with it.

Q. So, you had a problem of collecting taxes because of the curtailment of the season in 1946; is that your testimony? A. Yes. [97]

Q. Curtailment of gear. What did that problem amount to?

A. Of just merely so many licenses that weren't turned over at the time.

(Testimony of Thomas Parke.)

Q. How many?

A. Well, I couldn't tell you offhand. I didn't study up on it. I don't have those figures available.

Q. Residents or non-residents?

A. Non-residents.

Q. Non-residents?

A. Well, I wouldn't swear to it, but I do know that——

Q. If they lay off the poorest fishermen first and the residents have a lower average, does that mean they lay off the residents first?

A. No. Your residents, a good share of them are right there, and they might as well leave them. They are not feeding or anything, and they might just as well let them fish the rest of the season. It is the expensive men they are going to get rid of. The poor expensive ones they get rid of first.

Q. What do you mean—the more expensive ones?

A. Well, if they shipped a man up from Seattle——

Q. The contract requires they be shipped back?

A. Yes; they ship him back, sure, and they are feeding him all the time he is up there and, if he is not producing and the other fellow is less expensive, why naturally they get [98] rid of the expensive one first.

Q. Did you have any other license-collecting problem either with the residents or non-residents up at Bristol Bay last year except this business of the tendermen?

(Testimony of Thomas Parke.)

A. Yes, I did. I had considerable trouble with the fishermen themselves, the non-resident fishermen. They don't understand. They just weren't going to pay it.

Q. They don't like the idea of paying fifty dollars while residents were charged five; was that the reason? A. I think it was; yes.

Q. Was there any other reason that you know of?

A. Well, no. I think that would be the reason for it. I think if it had been probably two dollars and they could have got out of it, they would have tried that too. It is just a matter of expenses if they can save that by a little persuasion someplace here and there.

Q. Is that what they told you or is that just your speculation?

A. Well, all I know I had meetings with the big share of the fishermen themselves.

Q. Did you get any idea at any time that there would be any difficulty of collection if the non-resident license was five dollars, the same as the resident license? A. Yes.

Q. Did anyone ever suggest that to you up in Bristol Bay last [99] year?

A. Well, if it was exactly the same, why in that area itself there probably would be more of a——

Q. I am asking whether you learned from any non-resident fisherman up there that he had any

(Testimony of Thomas Parke.)

objection to paying a tax that was equal to the resident?

The Court: Well, what would the view of one fisherman have to do with this case? It seems to me that from the testimony of the witness here it would appear that non-residents, at least some of them, will evade paying any kind of tax even if it were five dollars. So, what one of them might think about it would be somewhat immaterial.

Mr. Paul: He stated that in generalities, your Honor. Now I would like to go into what the generalities are.

The Court: He stated what?

Mr. Paul: He gave us the impression that non-residents tried to avoid this tax because of their stinginess, let us call it, their economy. Now I would just like to know if that is really the basis or if that is just his speculation.

The Court: Well, but your question is directed to what one fisherman might have said and that wouldn't have any tendency to prove what all of them or a considerable portion of them might——

Mr. Paul: I meant to frame my question to allow the witness to identify any number and, if he said even one—— [100]

The Court: Well, one fisherman isn't going to help the Court out any. What one fisherman might have said, that just represents his individual view.

Mr. Paul: All right.

Q. Were there any fishermen then, non-resident

(Testimony of Thomas Parke.)

fishermen, who said that they had any objection to paying this tax?

The Court: The question is whether you know whether there would be any difficulty of collecting this tax if it were five dollars for non-residents.

Mr. Paul: Now, your Honor, just a moment. I am not going to ask this question—if he knows. That is the way the information was brought out on direct examination. I am engaged in testing where his knowledge comes from, and it can't be answered—you can't arrive at it.

The Court: Well, his knowledge of what? Let's see what you are trying to get at here. I am just trying to expedite this thing. Now, what are you trying to get at?

Mr. Paul: What the difficulty of collection was; whether it was based simply upon the discrimination that is the very subject matter of this suit, or some other objection.

The Court: In any event it would have to depend on what he knew. So, the objection to the use of the word "know" in my question certainly doesn't seem to be valid.

Mr. Paul: Well, I want details now. That is my point. I want details. [101]

The Court: Well, you better reframe your question, and let's get along here.

Q. Were you able to learn of any other reason, as was related to you by any of the fishermen, non-resident fishermen, in Bristol Bay, if they had any

(Testimony of Thomas Parke.)

objection to the payment of a tax the same as the resident tax?

A. Why, no. I wouldn't say that. I didn't have any fisherman come out and say, "Well, here I will give you five dollars the same as the residents." It is just naturally human nature he wouldn't do it, and it is natural.

Q. You didn't hear any objection to paying equal tax; the objection you heard was they didn't want to pay fifty dollars when the residents were paying five?

A. It never came to that. The only way I could get an answer to that would be to say, "Would you fellows be willing to give me five dollars instead of fifty?" And there is no—you know what the answer would be on that. So, it just didn't come up that way.

Q. Nobody brought it up voluntarily?

A. No.

Q. Now, what is this business about non-resident trapmen, where the canneries don't report all their traps?

A. That merely enters into just a case of evasion there due to—I wouldn't say purposely or otherwise.

Q. Is that something the non-resident trapmen do? [102]

A. No. Ordinarily it is, I am led to believe, the canneries pay that tax.

Q. There is some sort of an agreement whereby the employer pays the tax?

(Testimony of Thomas Parke.)

A. That is what I am led to believe. They claim in years back they weren't getting the proper pay with the rest of them and by paying the tax——

Q. The ones, as far as you know, the ones that were doing wrong would be the canneries?

A. Probably. Well, in that case it would be yes. And then——

Q. That is to say——

A. You have more deals where——

Q. The evasion of tax?

Mr. Williams: Your Honor, I suggest that counsel let the witness finish the answer to one question before he shoots another question at him.

The Court: Yes. As I see it, it makes no difference who is to blame for the difficulty in collecting the tax. It is a difficulty in collecting the tax no matter who it is. The fact that the cannery might be to blame for it doesn't alter the fact that it constitutes one of the difficulties in collecting the non-resident tax.

Mr. Paul: I agree with your Honor.

Q. Now, you say that the problem of tax collection among resident seiners in Southeastern Alaska is a small problem? [103]

A. Yes, it is.

Q. Because you can get them before or after the season. Isn't it wrong to get a license after the season when they should have a license before that?

(Testimony of Thomas Parke.)

A. Yes. That is where the enforcement comes in. If you can pick them up after the season, you can do what you please with them. But as a rule they are tied up with somebody. They ordinarily have to be supplied, and that is included with it.

Q. Now, how many resident—how many non-resident seiners have you failed to collect the tax from? Is that that thirty-one you were talking about here a while back; thirty-one cases you suspected?

A. All fishermen; that is all classes.

Q. All classes of fishermen. How many non-resident seiners have you failed to collect the tax from for evasion?

A. Well, it would be answered the same as the rest of it. As a whole, why fishermen are fishermen, and one license covers all types of fishing.

Q. You have no way of determining in your records?

A. No. There is no customs to check them coming in or check them going out.

Q. What about the halibut fishermen, do they get a license from you?

A. They did until this spring. The old law until this year [104] was written in such a way that the resident—it was the non-resident fishermen, the troller and seiner and the gillnetter had to have licenses, and the resident—no, it was a non-resident who uses hook and line in trolling, and the resident was fishermen of all classes needed a li-

(Testimony of Thomas Parke.)

cense and, therefore, we had to enforce the resident to buy, resident halibut men to buy a license. And when this law—they changed it this year—put halibut fishermen in on that same class—but that has been overruled, so that was stopped when the court ruled it was discriminatory, I believe.

Q. There is going to be no problem of collection among non-resident halibut men?

A. As the law stands right now.

Q. There is no law now?

A. There is no law now; that is right.

The Court: Well, I can see where my decision has been misconstrued.

Mr. Paul: Well, we won't depend on the witness for that, your Honor.

Q. You started to testify about some fish being flown out. What is that situation? I didn't get all that, Mr. Parke.

A. There is some men operating up around—are you acquainted in the Yakutat area, been in there?

Q. Oh, yes. [105]

A. Do you know the rivers?

The Court: It doesn't make any difference particularly where it is flown from. If that is what makes the difficulty, why we can eliminate the details unless he wants them or questions what you say.

Q. Are there non-resident fishermen up there?

A. Yes; there are a few get in there.

(Testimony of Thomas Parke.)

Q. How many?

A. Enough—our records at the office could show it. I couldn't swear to it offhand, but there are enough in there to pay to go in and get them.

Q. Four, is it?

A. I didn't give any figure on it.

Q. Well, I am asking you. Is it four; four non-resident fishermen?

A. I couldn't say offhand.

Q. Is it four?

A. I wouldn't say it is four.

Q. Fifty then?

Mr. Dimond: He said he didn't know, your Honor.

The Court: He said it four times now that he didn't know.

Q. Now, do you recall of any other particular enforcement problem—just a moment. I will withdraw that question. Now, why is it that you have to go to Bristol Bay to collect [106] the taxes through the canneries?

A. Well, due to, I would say, evasion, and the expense of going in there for what evasion shows up warrants the price of going in, and then for the good of the canneries. It is an accommodation to them; why we do go in.

Q. Do what?

A. For the accommodation. That season is short, and by the time they send those applications—they won't know until the day the fishermen are

(Testimony of Thomas Parke.)

on the grounds how many. Sending that all in and back out, and it takes time, and it takes time to issue them and to check on them. You would have to go in anyway for enforcement and so it is just as easy to go around and check. You would have to check the canneries anyway to see what was doing, otherwise it would be abused so much that——

Q. Well, now, when has it ever been abused?

A. Well, I mentioned a few minutes ago.

Q. One hundred and twenty tendermen last year?

A. One hundred and twenty times fifty is a lot of money.

Q. All right. Now, what other times has this system being used up there looked like it might be abused or was abused?

A. Well, I mentioned two more a few minutes ago that had fished and left applications that weren't turned in.

Q. That was two. What else?

A. If I had a chance to go back through the records, I could [107] show you more, but offhand, why, I can't.

Q. Can you give us any estimate as to how many more you might be able to show?

A. There is at each cannery—it comes up. It is a hard problem to show because it is ordinarily taken care of in a personal way. I get along very good with the cannerymen there, and you come in and just let it pass as a mistake. You can go in, and

(Testimony of Thomas Parke.)

they will have sixteen fishermen maybe, and you will figure, well heck, there is two or three men, only they forgot about that. Well, it is just as easy and a lot better to let it go as a mistake. You get your money and just pass it up. You get a lot of money out of that, and there is no hard feelings at all. You don't put that down.

Q. You are engaged in a public relations job then with the canneries; that is the bigger part of your duties up there, isn't it?

A. Well, if you want to call it that. If you can get the money——

Q. Your only real benefit in going to Bristol Bay is to collect from two part-time fishermen and try to persuade these one hundred and twenty tendermen to pay the tax?

A. I think Mr. Anderson told you approximately how many fishermen fish up there, and we issue a license to all of them.

Q. You actually make out the licenses? [108]

A. I actually issue the licenses right there. You can go into the cannery——

Q. The Territory doesn't have any agent at each cannery up there? A. No, they don't; no.

Q. Is there any agent at all in Bristol Bay?

A. No, there is not. Well, we do; we have a limited agent at Dillingham with instruction that he is only to issue to the occasional local resident in town, but as far as if we put an agent in there, we would put him in, if we had to put him on a com-

(Testimony of Thomas Parke.)

mission basis, why you can tell, multiplying the number of fishermen by fifty, how much commission would have to be paid up there, and by far the saving to the Territory is much more than to send me in.

Q. What is the appropriation for your office in 1949?

Mr. Dimond: I object to that, your Honor.

A. I don't know.

Mr. Williams: I object, your Honor. This office has a lot of things to do.

The Court: Objection sustained.

Q. Well, let's put it this way then. What was the amount of money spent by the Department of Taxation in 1949 to prevent evasions of payment of non-resident fishermen's license tax and resident fishermen's license tax?

A. I don't know. It would be up to Mr. Mulaney to give you [109] if he could.

Q. Could you give a close or approximate figure?

A. It is not my business to have those figures.

Q. Pardon me?

A. It is not my business to have those figures. My end of it is issuing and enforcement, not the expense of it.

Q. Don't you know how much it costs for you to travel around?

The Court: But the question is here, how much is attributable to the residents and how much to non-residents. I don't see how he could possibly know

(Testimony of Thomas Parke.)

that. It would be impracticable to make the segregation.

Mr. Paul: I think so too, your Honor.

The Court: Well, then let's not go into it.

Mr. Paul: Well, I would like the witness to say so.

The Court: He has already said he doesn't know of any way that he could tell that.

Mr. Paul: All right.

Q. You collect a license tax from tendermen, don't you, and fishermen?

A. Yes, I do; that is part of it, except Bristol Bay this year which we haven't collected to date, which we have a guarantee for if the law is valid.

Q. Have you ever been up in Bristol Bay, Mr. Parke, before the season started?

A. No, I haven't; I have never been in there. Ordinarily I [110] figure to get in there after things are settled down for the convenience of the canneries.

Q. Do you know when the men sign up the applications for fish licenses?

A. No; I am not there when that is done.

Q. I am asking if you knew, either from what the canneries have told you or what somebody else told you? A. What is that?

Q. When the men sign applications for fish licenses?

A. Well, from what I have been told by the fishermen themselves, is that they sign that when

(Testimony of Thomas Parke.)

they first get there. They have to sign, oh, several different receipts.

Q. Two or three days before the actual fishing starts then they sign up all these papers?

A. I couldn't say whether it was two or three days or two or three days after. I ordinarily figure to get in there about a week after, well, about five days after the fishing starts. If I were up there the first day of the season, why everything is in a mess and they don't know where they are.

Q. I don't mean you have to have an explanation on that. You don't know that the men sign up all these papers including fish license applications before the season starts?

A. No, I don't know; as long as they are signed before I get there. [111]

Q. They are all signed up a week after, except these one or two cases? A. Yes.

Mr. Paul: That is all.

The Court: Is the money attached to the application?

A. In some instances it is, but ordinarily the cannery just gives you a check. There are a few places where you will have money attached to every application.

The Court: Well, what is it, a voluntary proposition whether or not they sign an application?

A. No. They must sign the application. Well, if it were, oh, say for instance, if they walked into the office down here now, they would sign the appli-

(Testimony of Thomas Parke.)

cation right in front of me, and I would issue the license there, but through an agreement for the canneries in order for them to get their fishermen up there and get them in order—why, a lot of those applications I have noticed have been made out by the canneries, answering the questions, where they have been made out on the typewriter, and no fisherman knows how. They have all been made on the same typewriter and just signed by the man himself. He reads it over presumably and signs it. And a few instances where the money may be coming right out of their pay and is attached to it in dollars and cents, but we try to avoid that all we can in order to keep from carrying so much cash. [112]

The Court: That is all.

Mr. Dimond: That is all.

(Witness excused)

Mr. Dimond: I have no more witnesses, your Honor.

Mr. Paul: No rebuttal.

Whereupon respective counsel waived the reporting of the arguments, and Court recessed for ten minutes before proceeding to hear the arguments.

REPORTER'S CERTIFICATE

United States of America,
Territory of Alaska—ss.

I, Mildred K. Maynard, Official Court Reporter for the hereinabove entitled court, do hereby certify:

That as such Official Court Reporter I reported the above-entitled cause, viz. Oscar Anderson and Alaska Fishermen's Union, a labor union acting on behalf of certain of its members, vs. M. P. Mullaney, Commissioner of Taxation of the Territory of Alaska, No. 6102-A of the files of said court;

That I reported said cause in shorthand and myself transcribed said shorthand notes and reduced the same to typewriting;

That the foregoing pages numbered 1 to 113, both inclusive, contain a full, true and correct transcript of all the testimony and proceedings at the trial of the above-entitled cause on the date hereinbefore mentioned, to the best of my ability.

Witness, my signature this 10th day of June, 1950.

/s/ MILDRED K. MAYNARD,
Official Court Reporter.

[Endorsed] Filed June 23, 1950.

CLERK'S CERTIFICATE

United States of America,
District of Alaska—ss.

I, J. W. Leivers, Clerk of the District Court for the Territory of Alaska, First Division thereof, do hereby certify that the foregoing and hereto attached 159 pages of typewritten matter, numbered from 1 to 159, both inclusive, constitute a full, true and complete copy, and the whole thereof, of the

record prepared in accordance with the Designation of Portions of the Record; Supplemental Designation of the Record; Statement of Points and Stipulation to correct Transcript of Record on Appeal of Appellant on file herein and made a part hereof, in Cause # 6102-A, wherein Oscar Anderson and Alaska Fishermen's Union, is Plaintiff-Appellant and M. P. Mullaney, Etc. is Defendant-Appellee as the same appears of record and on file in my office; that said record is by virtue of an appeal in this cause.

I further certify that the transcript was prepared by me in my office, and that the cost of preparation, examination and certification amounting to Twenty-Two Dollars and 85/100 has been paid by Counsel for Appellant.

In Witness Whereof, I have hereunto set my hand and the Seal of the above-entitled court this 20th day of June, 1950.

J. W. LEIVERS,

Clerk of the District Court.

[Seal] By /s/ P. D. E. McIVER,
Deputy Clerk.

[Endorsed]: No. 12586. United States Court of Appeals for the Ninth Circuit. Oscar Anderson and Alaska Fishermen's Union, Appellants, vs. M. P. Mullaney, Commissioner of Taxation of the Territory of Alaska, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Division Number One.

Filed June 23, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the
Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit Court

No. 12586

OSCAR ANDERSON and ALASKA
FISHERMEN'S UNION,

Appellants,

vs.

M. P. MULLANEY, Commissioner of Taxation,
Territory of Alaska,

Appellee.

APPELLANT'S STATEMENT OF POINTS

1. That Chapter 66 of the Session Laws of 1949 (approved March 21, 1949) of the Territory of Alaska, enacted by the territorial legislature in the 1949 session, in its entirety and as to each and every

section thereof, is unlawful and unconstitutional in that it violates Section Nine of the Organic Act of the Territory of Alaska; Article 1, Section 8, and Article 3, Section 2, of the Constitution of the United States and the 14th Amendment to the Constitution of the United States.

2. The finding of the District Court that approximately ninety per cent (90%) of the cost of collecting the license tax from non-resident fishermen is required to collect or enforce the same is not substantiated under the testimony and evidence.

3. Conclusion number one (1) of the District Court that Chapter 66 of the Session Laws of 1949, Laws of Territory of Alaska, does not contravene the Organic Act and United States as enumerated in Point 1, is wrong.

4. Conclusion number two (2) of the District Court ~~and~~ ^{that} Chapter 66 of the Session Laws of 1949 is valid because it rests on substantial differences bearing a fair and reasonable [117] relation to the object of the legislation, is wrong.

5. That Conclusion number three (3) that the \$50.00 license fee imposed on non-resident fishermen under Chapter 66 is reasonable and not excessive, is wrong.

co 6. That Conclusion number four (4) of the District Court that Chapter 66 is a valid Act, and the Complaint and amended complaint should be dismissed, is wrong.

7. That the judgment and decree entered in said cause dismissing the complaint and amended complaint is in error.

/s/ ROY E. JACKSON,
Attorney for Appellants.

[Endorsed]: Filed July 14, 1950. [118]

[Title of District Court and Cause.]

DESIGNATION OF RECORD
TO BE PRINTED

To the Clerk of the United States Court of Appeals
for the Ninth Circuit, San Francisco 1, California.

You are requested to include in the printed record to be prepared in this cause the following documents, to wit:

1. Complaint.
2. Amendments by interlineation.
3. Amended Answer.
4. Reporter's Transcript of Testimony.
5. Stipulated Notes of January 19, 1950, Perpetuated Testimony.
6. Journal entry at page 385, of March 14, 1950. Page 140.
7. Defendant's Answer to Interrogatory No. 3, filed March 15, 1950.
8. Defendant's Answer to Interrogatories, filed March 13, 1950.

9. Plaintiff's Interrogatories numbered 1, 2 and 3.

10. Plaintiff's Waiver of February 4, 1950.

11. Opinion of Court.

12. Findings of Fact and Conclusions of Law.

13. Judgment.

14. Notice of Appeal.

15. Cost Bond on Appeal.

16. Designations of Portions of the Record. [119]

17. Supplemental Designation of the Record.

(Index of Clerk's Transcript of Record has not been supplied this office. We trust you can identify all the documents in the case without difficulty.)

/s/ ROY E. JACKSON,

Attorney for Appellants.

[Endorsed]: Filed July 14, 1950. [120]

No. 12586

In The United States
Court of Appeals

For the Ninth Circuit

OSCAR ANDERSON and ALASKA FISHER-
MEN'S UNION, *Appellants,*

vs.

M. P. MULLANEY, Commissioner of Taxation of the
Territory of Alaska, *Appellee.*

Upon Appeal From the District Court for the
Territory of Alaska, Division Number One

BRIEF FOR THE APPELLANTS

FILED

OCT - 9 1950

ROY E. JACKSON & CARL B. LUCKERATH

WM. L. PAUL, JR.,

PAUL P. O'BRIEN,
For Appellants. **CLE**

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In The United States Court of Appeals

For the Ninth Circuit

No. 12586

**OSCAR ANDERSON and ALASKA FISHER-
MEN'S UNION,** *Appellants,*

vs.

**M. P. MULLANEY, Commissioner of Taxation of the
Territory of Alaska,** *Appellee.*

**Upon Appeal From the District Court for the
Territory of Alaska, Division Number One**

BRIEF FOR THE APPELLANTS

OPINION BELOW

The opinion of the District Court, as yet unreported, will be found at R. 14-18.

JURISDICTION

This is a suit to enjoin appellee from enforcing the provisions of Chapter 66, Session Laws of Alaska, 1949, against non-resident fishermen and for a decree and judgment declaring said Act unconstitutional and invalid at least insofar as the same requires the payment of a \$50.00 license fee by non-resident members of ap-

pellant, Alaska Fishermen's Union, and for such other and further relief as may appear just. The Act involved imposes a license fee of \$5.00 on residents in certain enumerated categories related to the fishing industry in Alaska and a license fee of \$50.00 for each non-resident engaged in the same categories. Findings of Fact, Conclusions of Law and Decree and Judgment were entered in this cause April 18, 1950, sustaining the validity of the Act and dismissing the Complaint and Amended Complaint therein filed. (R. 18-24). Notice of General Appeal and Cost Bond on Appeal were filed May 15, 1950, and Designations of Portions of the Record were filed May 16, 1950. (R. 25-28). The jurisdiction of the District Court was invoked under the Act of June 6, 1900, C. 786, §4, 31 Stat. 322, as amended, 48 U.S.C.A. §101. The jurisdiction of this court rests on §1291 of the New Federal Judicial Code.

QUESTION PRESENTED

Whether Chapter 66, Session Laws of Alaska, 1949, is a valid exercise of the taxing authority of the Territory.

STATEMENT OF POINTS

The Statement of Points (R. 44-45) may be summarized as follows:

1. That Chapter 66 of the Session Laws of 1949 (approved March 21, 1949) of the Territory of Alaska, enacted by the territorial legislature in the 1949 session, in its entirety and as to each and every section thereof, is unlawful and unconstitutional in that it violates Section Nine of the Organic Act of the Territory of Alaska; Article

- 1, Section 8, and Article 3 (4), Section 2, of the Constitution of the United States and the 14th Amendment to the Constitution of the United States.
2. That the testimony and evidence in the record does not substantiate the finding of the District Court that approximately ninety per cent (90%) of the cost of collecting the license tax is incurred in attempting to collect said tax from non-resident fishermen.
3. The court erred in its conclusions Nos. I, II and III to the effect that Chapter 66, S.L.A. 1949, does not contravene the Organic Act and United States Constitution and Laws as enumerated in Point I, and that the non-resident license tax is reasonable and not excessive and rests on substantial differences bearing a fair and reasonable relation to the object of the legislation.
4. The court erred in its conclusion No. IV declaring Chapter 66, S.L.A. 1949, was a valid Act and in entering judgment and decree dismissing plaintiff's complaint and amended complaint.

STATEMENT OF CASE

This action was instituted May 23, 1949, by appellant, Alaska Fishermen's Union, a labor union chartered by the International Fishermen and Allied Workers of America, affiliated with the Congress of Industrial Organizations, by and through Oscar Anderson, its secretary-treasurer, under the authority of his office pursuant to the instructions of the Union, on behalf of its members, who are classified as fishermen and who are classed as non-residents of Alaska, to enjoin the enforcement of Chapter 66, S.L.A. 1949, at least with respect to the non-resident license fee, and to have the entire Act, or at least that portion relating to non-

residents, declared invalid. (R. 2-9). The legislature of the Territory of Alaska, during its regular session in 1949, enacted a revenue measure, identified as Chapter 66 of S.L.A. 1949, which was approved by the Governor on March 21, 1949, and became a law of the territory. It amended a previously existing law by increasing the license fees required of non-resident fishermen and various employees and individuals connected with the processing and handling of salmon and other fishery resources in the Territory of Alaska from \$25.00 to \$50.00 per annum and license fees of the resident fishermen in the same classifications from \$1.00 to \$5.00 per annum. During the summer of 1949 approximately 3000 members of appellant union, who were non-residents of Alaska, living principally in California, Oregon and Washington, and who were employed by fish packing companies within the Territory of Alaska during the salmon season, were obliged to obtain and pay the \$50.00 license required under the Act involved. The union also represents some 2000 resident fishermen, who fish in Alaska each fishing season and who were licensed in the same manner on payment of a \$5.00 license fee. Various interrogatories were submitted to appellee, M. P. Mullaney as Commissioner of Taxation of the Territory of Alaska, by counsel for appellants, on February 28, 1950, the answers to which reveal that appellee is unable to allocate the cost or the services necessary, usual or required with respect to the fishermen's license taxes involved, either in the aggregate or

as to residents and non-residents respectively. (R. 29-42). The testimony of seven resident fishermen was perpetuated pursuant to minute order and stipulated notes January 19, 1950, and reflects individual annual net earnings over the past several years averaging in the neighborhood of \$2250.00. The testimony indicates the average earnings of non-residents may be slightly higher. (R. 10-14, 29). The matter came on for trial March 16, 1950, at Juneau, Alaska, at which time witness Oscar Anderson for appellant and Thomas Parke, Special Deputy Enforcement Officer, for the Alaska Department of Taxation, for appellee, were examined at length. (R. 46-152). Following argument of counsel the court took the matter under advisement and rendered his written opinion March 21, 1950, (R. 15-18), in which he sustained the validity of the Act. Findings of Fact and Conclusions of Law were entered in accordance with the court's opinion. (R. 18-23), and on April 18, 1950, a judgment and decree was entered sustaining the validity of the Act and dismissing plaintiff's complaint and amended complaint. (R. 23-24). This appeal followed (R. 25).

SUMMARY OF ARGUMENT

I

The finding of the trial court that ninety per cent (90%) of the cost of collecting the tax under Chapter 66, S.L.A. 1949, is incurred in collecting and attempting to collect the non-resident taxes is wrong and unsupported in the record.

II

Subparagraph 2, Chapter 66, Session Laws of Alaska, 1949, fails to provide the uniformity and equality demanded by the Organic Act, the 14th Amendment and the Civil Rights Act.

The Civil Rights Act (8 U.S.C.A. Sec. 41) imposes upon territories of the United States the same requirement for equality and uniformity of taxes, licenses and exactions of every kind between the citizens of the territory and any other citizen of the United States as is required under the Constitution and the 14th Amendment by each state with respect to the citizens of other states. This is expressly recognized in the case of *Martenson v. Mullaney*, 85 Fed. Supp. 76 (1949), and the recent decision of the Ninth Circuit Court in *Alaska Steamship Company v. Mullaney* (C.C.A. 9th, March 1, 1950), 180 Fed. (2d) 1805. The effect of these decisions and the application of the Civil Rights Act to the enactment involved in this case is to expand the narrow rule of restraint on the taxing power of territorial legislatures recited in *Anderson v. Smith*, 71 Fed. (2d) 493.

The imposition of a license tax on a non-resident ten times as great as that on residents cannot be justified within the restrictions of the Civil Rights Act and the 14th Amendment requiring equality and uniformity in the imposition of taxes and licenses and is an attempt at discriminatory classification. *Toomer v. Witsell*, 334 U.S. 385 (1948).

III

The act is invalid as a burden on Interstate Commerce. The Salmon Packing industry is entirely interstate, *McComb v. Fisheries Co.*, 174 Fed. (2d) 74 (1949). Chap. 66, S.L.A., 1949, extends beyond those directly engaged in catching the fish, to those receiving the fish, tending traps, crews of tenders, etc. It prohibits the purchase of fish from an unlicensed person. This constitutes an encumbrance and burden on the operation of the interstate business by the companies engaged therein, whether it is treated as a tax upon the privilege of doing interstate business within the state or as a tax upon some local event so much a part of interstate business as to be in effect a tax upon the interstate business itself. *Memphis Natural Gas. Co. v. Stone*, 334 U. S. 314 (1948).

ARGUMENT

I

THE FINDING OF THE TRIAL COURT THAT 90% OF THE COST OF COLLECTING THE TAXES UNDER CHAPTER 66, S.L.A. 1949, IS INCURRED IN COLLECTING OR ATTEMPTING TO COLLECT THE NON-RESIDENT TAX, IS WRONG AND UNSUPPORTED IN THE RECORD.

The Judge of the District Court found that 90% of the cost of collecting the fisherman's license tax under Chapter 66, S.L.A. 1949, is incurred in collecting or attempting to collect said taxes from non-resident fishermen (Finding number 9, R. 21; opinion R. 17). A scrutiny of the Record fails to disclose any support for this holding. The witness Thomas Parke, being the only witness offered who made any reference to differences

in cost or problems of collection, disclaimed any knowledge of the expense, actual or relative, of the collection of the tax involved as between residents and non-residents. (R. 148-149). He also stated that there was no way of determining how many non-resident trollers or purse seiners come to Alaska (R. 124-125).

This testimony is well supported by the Answer of Commissioner Mullaney (R. 31-32) to interrogatories propounded by Plaintiff February 4, 1950 (R. 33-34) in which he clearly states that he cannot from his files and records determine the services or costs attributable to collection respectively of resident and non-resident fishermen's license taxes, and his answer (R. 29-30) to interrogatory No. (3) of set number "3" (R. 40) is couched in general terms which fail completely to indicate any specific additional cost or service attributable solely to non-resident fishermen, or to even estimate the relative costs of each type of collection, in their entirety or on a basis of the comparative cost of collecting each type of tax.

Contrariwise the record indicates there has been but a single paid agent relegated to the enforcement of the license tax involved, and that, though his work might not be so onerous, his employment would nevertheless be required if only resident license fees were collected. (R. 120-121). Further, it appears that a very substantial portion of the issuance of taxes and collection is accomplished directly through the cannery personnel and by a process of withholding. (R. 50, 72,

97, 110). The resident agents in the various fishing villages and towns are paid on a commission basis, and are required as well for resident as for non-resident persons covered. (R. 97, 147-148).

Apprehension of non-resident violators is effected almost exclusively through the voluntary services and reports by residents, who appear only too willing and anxious to assist the enforcement officer. (R. 99, 103, 126).

The finding of the Court evidently is derived solely from the following testimony at the close of the direct examination of witness Parke:

“Q. Have you formed an opinion as to whether it is more difficult to enforce this license tax against non-resident fishermen as compared with resident fishermen?

A. By far; yes. At least ninety per cent of the *work* would be with the non-resident.” (R. 120, italics supplied.)

Obviously the Court in his finding has transposed the word *cost* for the word *work*. There is not necessarily a direct correlation between the two items, and while from his testimony it appears that the witness concerns himself principally with seeking out non-resident violators, there is nothing to suggest that the collection cost is materially greater than would be incurred if all collections were from resident fishermen. A fair appraisal of this witness' testimony and the entire record would indicate the cost attributable to collecting non-resident licenses is confined to the operating cost on Parke's collection boat when pursuing

special investigation leads, and couldn't conceivably increase the relative cost of collection of non-resident licenses to more than half again the cost of collecting resident fees.

This is a most vital error of fact; particularly in view of the language in the recent authoritative decision of *Toomer v. Witsell*, 334 U. S. 385, as follows:

“ . . . The State is not without power . . . to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose. . . . ”

II

THE ACT OF MARCH 21, 1949, DESIGNATED AS CHAPTER 66, SESSION LAWS OF ALASKA, 1949 IS INVALID.

A. The Act Is Invalid Because It Fails to Provide the Uniformity and Equality Demanded by the Organic Act, the Fourteenth Amendment and the Civil Rights Act.

This court in the recent decision of *Alaska Steamship Co. v. Mullaney* (C.C.A. 9th, March 1, 1950), 180 Fed. (2d) 805, stressed the point that the constitution followed the flag to Alaska, referring to recitals in the Organic Act (48 U.S.C.A. Secs. 23 and 78) and concluding:

“ We therefore approach the arguments made with respect to alleged inequality, arbitrary classifications, and attempted impact on incomes received outside Alaska with the assumption that the validity of the Act must be judged by the same standards of due process and of equal protection that would be applied in the case of similar legislation by a state. . . . ” (p. 818).

It also makes reference to the Civil Rights Act (8 U.S.C.A. Sec. 41) in a footnote.

The cases of *Haavik v. Alaska Packers Assn.*, 263 U. S. 510; *Freeman v. Smith*, 44 Fed. (2d) 703, Id., 62 Fed. (2d) 291, and *Anderson v. Smith*, 71 Fed. (2d) 493 reached a result expressed in the latter citation:

“It is clear then that so long as the license tax imposed by the territorial Legislature upon the citizens of the U. S., who are not residents of Alaska is not so exorbitant as to practically prohibit, or so unreasonable as to interfere with, the exercise of the right granted by Congress, it is within the power of the territorial legislature” (p. 495).

This position, however, stems from the holding of the Supreme Court in the *Haavik* decision to the effect that Sec. 2, Art. 4 of the Constitution, and by analogy the 14th Amendment guarantees uniformity and protection of privileges and immunities as among the citizens of the several *states*, but not as between *territorial* citizens and citizens of the *states*. It is only on this line of reasoning that the court can arrive at the narrow restraint quoted from the *Anderson* opinion.

However, in 1949, Judge Folta, the trial court in the instant case rendered an opinion in *Martensen v. Mullaney*, 85 Fed. Supp. 76 (1949) in which he called attention to the fact that the previous decisions appear to have overlooked the Civil Rights Act (8 U.S.C.A. Sec. 41) which expressly extends to all citizens within the jurisdiction of the U. S., either in states or territories, and guarantees that they shall be subject to like “taxes, licenses, and exactions of every kind, and to no other”. This is clearly a right granted by Congress within the

language of this Circuit Court in the second *Freeman* decision (62 Fed. (2d) 291) where discussing the holding in the *Haavik* case it is said that decision was:

“*not* decisive of the right of the territorial legislature (under the act of June 6, 1924) to so discriminate between citizens of the U. S. who are residents and those who are non-residents of Alaska *where both have been granted a right by Act of Congress*” (p. 293, italics supplied).

Such being the situation the instant legislation must be appraised on exactly the same basis as similar legislation by a State, and the narrow restraints of the *Anderson v. Smith* (*supra*) decision are not the proper test. This makes the recent decision in the case of *Toomer v. Witsell* (*supra*), and the language therein contained pertinently applicable. The *Toomer* case involved a State law imposing a license fee of \$25.00 on resident, and \$2500.00 on non-resident shrimp boats. The decision held the law invalid under the privileges and immunities clause of Art. 4, Sec. 2 of the Constitution, but implies a like result could be reached under the uniformity and equality provisions of the 14th Amendment. Referring to Art. 4, Sec. 2 the opinion states:

“... the purpose of that clause ... is to outlaw classifications based on the fact of non-citizenship unless there is something to indicate that non-citizens constitute a peculiar source of the evil at which the statute is aimed.”

and continues,

“... The State is not without power, for example, to restrict the type of equipment used in its fish-

eries, to graduate license fees according to the size of the boats, or even to charge non-residents a differential which would merely compensate the State for any added enforcement burden they may impose or for any conservation expenditures from taxes which only residents pay. (p. 398, italics supplied).

In *Martinsen v. Mullaney* (*supra*), Judge Folta, in holding the indential law here under consideration to be invalid, the court stated:

“The act is clearly a revenue measure. Indeed, the Territory is prohibited by Section 3 of the Organic Act, 37 Stat. 512, 48 U.S.C.A. 24, from regulating the fisheries. Congress has regulated halibut fisheries since June 7, 1924, 42 Stat. 648, and the salmon fisheries of Alaska since 1889, 25 Stat. 1009. The present law regulating the salmon fisheries may be found in 48 U.S.C.A. 221 et seq., and that regulating halibut fisheries in 16 U.S.C.A. 772 et seq.” (p. 77-78, italics supplied).

This decision was based upon a stipulation, referring to which the Court says:

“The stipulation contains no facts tending to justify the discrimination in this case on any ground, such as the difficulty of collecting the tax from non-residents or showing that, considering the tax scheme of the Territory or the distribution of the tax burden, the discrimination is more apparent than real, and of course none can be made on the ground that it is necessary for the conservation of the halibut fisheries because, as has already been pointed out, the Territory is not empowered to regulate the fisheries in territorial waters or on the high seas. In this situation the comment of the Supreme Court in *Colgate v. Harvey*, (296 U.S. 404) p. 422, would appear to be particularly apt:

“ ‘Upon the face of the statute, the classification is based upon a difference having no substan-

tial or fair relation to the object of the act which, so far as this question is concerned, simply is to secure revenue. No other public purpose will be served.' ”

whereupon the Court reached the conclusion that Chapter 66, S.L.A., 1949, “so far as it imposes a higher tax on non-residents employed or engaged in handling halibut in Alaska, contravenes the Civil Rights Act and, hence, is invalid”.

We earnestly submit there is nothing on the face of the statute, and nothing in the record in this case to materially alter the situation from that presented in the *Martinsen* case. There is no clear showing of difference in cost of collection as to resident and non-resident citizens, or of any attempt by the enforcement agency to determine or maintain a record indicating such a difference, so as to meet the test in the *Toomer* case warranting “a differential which would *merely* compensate the State for any added enforcement burden they may impose”. Nor is there anything to support the gratuitous suggestion at the close of the trial court’s opinion (R. 18) that the act may have been designed to encourage settlement and prefer local enterprise. It appears to be and is, as declared by Judge Folta in the *Martinsen* opinion “clearly a revenue measure”, and only matters bearing a fair and reasonable relation to that object can support a discrimination between resident and non-resident.

A moment’s reflection on the factual situation reveals the paucity of any argument that the discrimination in-

volved can be justified on the contention that the differential would merely compensate the State for the added enforcement burden that collection from non-resident might involve. Aside from the negative position on this point established in point I of the argument, it is suggested that no revenue measure could be justified which consumed more than twenty per cent in collection; indeed, collection on most such measures falls below five per cent. On the basis of twenty per cent, collection of the resident fee would not exceed one dollar per license. Accepting the government's contention of nine times the cost to collect non-resident fees, a difference in fee of not more than nine dollars could be justified. The difference in the tax here involved is five times that great. For the government to justify the difference in tax here involved it is driven to the absurd position that the entire tax is consumed in collection cost, as the tax imposed on non-residents is ten times as great as that imposed on residents.

B. The Act Is Invalid as a Burden on Interstate Commerce.

It is fully recognized that the business of the companies engaged in salmon packing is entirely interstate. *McComb v. Consolidated Fisheries Co.*, 174 Fd. (2d) 74 (1949). The act involved covers any person who fishes commercially for salmon etc. and includes every individual aboard boats operated for fishing purposes who participates directly or indirectly in the taking of the raw fishery product, whether such participation be on shore or as an employe or otherwise, and also includes

trap watchermen or others engaged in operating fish traps as well as crews of tenders or other floating equipment used in handling of fish. It prohibits the purchase of fish from an unlicensed person.

It may be that the interstate commerce clause (Const. Art. 1, Sec. 8) was not violated in the *Toomer* case for the reason that the taxable event — in that case the taking of the shrimp — occurs before the shrimp have entered the flow of commerce. But in the instant case the tax is much broader and applies to enumerable personnel in addition to the actual fishermen or boat operators. Sizeable numbers are covered who assist the product in its process through the industry which is admittedly interstate in character.

A State tax upon a corporation doing only an interstate business may be held invalid because levied (1) upon the privilege of doing interstate business within the case, or (2) upon some local event so much a part of interstate business as to be in effect a tax upon the interstate business itself. *Memphis Natural Gas Co. v. Stone*, 334 U.S. 314 (1948); *Underwood Typewriter Co. v. Chamberlain*, 254 U.S. 1131 (1920); *Atlantic and Pacific Telegraph Co. v. Philadelphia*, 190 U.S. 160 (1903). While the instant tax is levied against the individuals employed and engaged in the interstate business, the cannery companies are prohibited from employing or doing business with unlicensed individuals, and thus the interstate business is directly encumbered and burdened. *Fisher's Blend Station v. Tax Commission*, 297 U.S.

650; *Puget Sound Stevedoring Co. v. State Tax Commission*, 302 U.S. 90; *Gwin, White & Prince v. Henneford*, 305 U.S. 434; *Freeman v. Hewitt*, 329 U.S. 249; *Albuquerque Broadcasting Co. v. Bur. of Rev.* (N.M., 1949, 184 Pac. 2nd 416).

CONCLUSION

For the foregoing reasons it is respectfully submitted (1) that the decree of the District Court should be reversed to the extent that it holds Chapter 66, Session Laws of Alaska, 1949, as a valid Act, and (2) that the case should be remanded to the court for entry of a decree enjoining appellee from further collection of taxes under said Act, particularly with respect to non-residents, and directing the refund of taxes heretofore illegally collected thereunder.

WILLIAM PAUL, JR.,

ROY E. JACKSON,

CARL B. LUCKERATH

Attorneys for Appellant

APPENDIX A.**Chapter 66, Session Laws of Alaska, 1949:**

* * *

“Section 1. For the purposes of this Act, ‘fishermen’ shall mean any person who fishes commercially for, takes or attempts to take salmon, halibut, bottom fish, crabs, clams, or other fishery resources of Alaska, and shall include every individual aboard boats operated for fishing purposes who participates directly or indirectly in the taking of the raw fishery products above mentioned whether such participation be on shares or as an employee or otherwise. The term “fisherman shall also include trap watchmen or others engaged in operating fish traps as well as the crews of tenders or other floating equipment used in handling of fish.”

“Section 2. No person shall become engaged as a fisherman as above defined without first obtaining a license so to do. License fees levied upon fishermen are as follows: Resident fishermen, \$5.00; non-resident fishermen, \$50.00 * * *.”

“Section 3. Licenses to fish shall be issued by the Tax Commissioner pursuant to written applications containing such information as may be required by the Tax Commissioner, and such licenses may also be issued by his deputies. * * *.”

“Section 4. The Tax Commissioner is hereby authorized to appoint United States Commissioners, cannery or cold storage agents, fish buyers or other persons as his agents to take applications, issue the licenses and collect license fees hereunder, and with respect to such persons not employed on salary by the Tax Department, the Tax Commissioner is hereby authorized to establish reasonable and uniform rates of compensation for such services on a commission basis for issuance of each resident and non-resident license. * * *.”

“Section 5. It shall be unlawful for any person, association or corporation, or for the agent of any person, or for the officer or agent of any association or corporation, to have in his, their or its employ any fisherman who is not duly licensed under this Act or to purchase fish from any fisherman who is not so licensed. * * *. Any one violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction, punishable under the penalty clause of this Act.”

“Section 6. * * * (b) Licenses shall be subject to inspection, and shall, upon request by an officer authorized to enforce this Act, be exhibited by him. Failure to procure or exhibit such license as indicated above or otherwise comply with this Act shall be a misdemeanor, and upon conviction thereof the offender shall be subject to a fine not exceeding \$500.00 or imprisonment not to exceed six months, or to both such fine and imprisonment.”

“Section 7. This Act shall not apply to fishing for personal consumption but shall apply only to fishing for commercial purposes. * * *”.

APPENDIX B.

Civil Rights Act, R.S. 1977, 8 U.S.C.A. 41:

“All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.”

In the United States
COURT OF APPEALS
For the Ninth Circuit

OSCAR ANDERSON and
ALASKA FISHERMEN'S UNION,

Appellants,

v.

M. P. MULLANEY, Commissioner of Taxation
of the Territory of Alaska,

Appellee.

Upon Appeal from the District Court for the Territory
of Alaska, First Division

BRIEF FOR APPELLEE

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Note:

The relevant portions of Chapter 66, Session Laws of Alaska, 1949, are set out in Appendix A. The uniformity clause of Section 9 of the Alaska Organic Act (48 USCA §78) is set out in Appendix B.

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No. 12586

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Appellee.

Upon Appeal from the District Court for the Territory
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BRIEF FOR APPELLEE

OPINION BELOW

The opinion of the District Court, as yet unreported,
will be found at R. 14-18.

JURISDICTION

This is a suit to enjoin the appellee from enforcing the provisions of Chapter 66, Session Laws of Alaska, 1949, and to have declared unconstitutional and invalid that portion of Chapter 66 which requires every

nonresident fisherman, as that term is defined therein, to pay a license fee of \$50 for the privilege of becoming engaged as a fisherman in the Territory of Alaska (R. 2-6). Judgment and decree was entered on April 18, 1950, sustaining the validity of the Act in its entirety and dismissing the complaint and amended complaint (R. 23). An appeal was taken on May 15, 1950, by filing with the district court a notice of appeal (R. 25). The jurisdiction of the district court was invoked under the Act of June 6, 1900, c. 786, §4, 31 Stat. 322, as amended, 48 USCA §101. The jurisdiction of this court rests on §1291 of the New Federal Judicial Code.

QUESTION PRESENTED

Whether Chapter 66, Session Laws of Alaska, 1949, is a valid exercise of the taxing authority of the Territory.

STATEMENT

This action was instituted by appellants on May 26, 1949, to enjoin the enforcement of Chapter 66, Session Laws of Alaska, 1949, and to have declared invalid that portion of Chapter 66 which requires each nonresident fisherman, as that term is defined therein, to pay a license fee of \$50 before becoming engaged as a fisherman in the Territory of Alaska (R. 2-6). Appellant, Alaska Fishermen's Union, brought this action for the benefit of those of its members who are

nonresident fishermen and who are employed by fish packing companies in Alaska to work as gillnet fishermen, trap fishermen and as crews of tenders and other floating equipment used in handling fish (R. 2-3). Appellants' principal claim of invalidity of Chapter 66 is based upon what they allege to be an unlawful discrimination against nonresident fishermen wherein a \$50 fee is imposed upon nonresidents and only a \$5 fee upon residents.

On January 19, 1950, this case came before the court to perpetuate the testimony of seven witnesses on behalf of appellee (R. 29). This testimony was recorded, and as reduced to narrative form, was offered and admitted in evidence at the trial (R. 10-14). Trial was had on March 16, 1950, at which time appellants introduced testimony in support of their complaint and appellee introduced testimony in support of the affirmative defenses contained in his amended answer (R. 46-151). On March 21, 1950, the court issued an opinion holding that Chapter 66, Session Laws of Alaska, 1949, was valid in its entirety (R. 14-18). Findings of fact and conclusions of law were filed in accordance with the court's opinion (R. 18-23), and on April 18, 1950, judgment and decree was entered sustaining the validity of Chapter 66 and dismissing appellants' complaint and amended complaint (R. 23-24). This appeal followed (R. 25).

SUMMARY OF ARGUMENT

I.

Chapter 66, Session Laws of Alaska, 1949, an Act providing for the licensing of fishermen in Alaska, is a valid exercise of the legislative authority of the Territory. Under Section 3 of the Alaska Organic Act (Act of Aug. 24, 1912, c. 387, §3, 37 Stat. 512, 48 USCA §24) the territorial legislature has the express authority to impose a license tax on fishermen, *Alaska Fish Co. v. Smith*, 255 U. S. 44, 49; *Anderson v. Smith*, 71 F(2) 493; and since the classification between resident and nonresident fishermen in this Act satisfies the requirements of the equal protection clause of the Fourteenth Amendment to the United State Constitution, neither Section 9 of the Alaska Organic Act (Act of Aug. 24, 1912, c. 387, §9, 37 Stat. 514, as amended, 48 USCA §78), nor the Civil Rights Act (R.S. §1977, 8 USCA §41), have been contravened. *Alaska Steamship Co. v. Mullaney*, 180 F(2) 805, 817-818; *Martinsen v. Mullaney*, 85 F. Supp. 76, 79.

A. Since the legislature's chief objective in taxation is to obtain a fair distribution of the cost of government, *Welch v. Henry*, 305 U. S. 134, 144, the uncontradicted proof that almost insuperable difficulties must be met by appellee and his agents in collecting or attempting to collect the tax from nonresident fishermen, which do not have to be met with respect to the residents, fully supports a basis for the imposition of a higher tax on the former—one that

rests on substantial differences bearing a logical relation to the object of the legislation. *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415. Administrative convenience and expense in the collection of the tax are alone a sufficient justification for the difference in treatment given. *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 511.

B. The fact that perfect uniformity may not have been achieved does not invalidate the Act. Equal protection has never required the legislature, with mathematical accuracy, to make meticulous adjustments in distributing the burden of government, *Welch v. Henry*, 305 U. S. 134, 145; it is not a valid objection to the classification, therefore, that appellee has not proved that the differential between the nonresident and resident tax is exactly equal to the difference in the cost of collection between the two classes. Sufficient facts have been produced by appellee to raise a presumption of constitutionality of the Act; and appellants, in attacking the legislative arrangement, have completely failed to assume the burden of negating every conceivable basis that might support it. *Madden v. Kentucky*, 309 U. S. 83, 88.

C. In some cases a classification of taxpayers may be upheld as having a fair and substantial relation to a constitutional non-fiscal object. *Rapid Transit Corp. v. New York*, 303 U. S. 573, 587. In requiring a higher tax from the nonresident fishermen, the legislature could well have intended to encourage the

settlement of the Territory—a legitimate end of governmental action. *Haavick v. Alaska Packers Assn.*, 263 U. S. 510, 515.

II.

What has been already said with respect to the classification as it relates to equal protection, disposes of any contention that there is anything in the Act that violates the due process requirements of the Fourteenth Amendment. *Fox v. Standard Oil Co.*, 294 U. S. 87, 103. Nor is the amount of the non-resident tax so great as to deprive the nonresidents of their right to fish, guaranteed by the White Act (Act of June 6, 1924, c. 272, §1, 43 Stat. 464, 48 USCA §222). One who averages net earnings of \$2500 for a fishing season of twenty days, or even one who earns \$3500 during a season of from four to five months, can hardly contend that a tax of \$50 is so exorbitant as to “practically prohibit . . . or interfere with the exercise of the right granted by Congress.” *Anderson v. Smith*, 71 F(2) 493, 495. There is a considerable difference between the \$50 tax under the territorial Act and the \$2500 fee exacted from nonresident fishermen in South Carolina which was found to be unreasonable and prohibitive in *Toomer v. Witsell*, 334 U. S. 385.

III.

Under no circumstances can the Act be construed as burdening interstate commerce. The business of fishing is purely a local business, subject to local taxation,

and is clearly distinguishable from the business of shipping fish in interstate commerce. Cf. *Oliver Mining Co. v. Lord*, 262 U. S. 172, 178-179. The taxable event—the taking of the fish—occurs before the fish have entered the flow of commerce. *Toomer v. Witsell*, 334 U. S. 385, 394-395.

IV.

The assertion that the Act adversely affects the uniformity of general maritime law has already been disposed of by what this court said in the case of *Alaska Steamship Co. v. Mullaney*, 180 F(2) 805, 812-814. The “essential features of an exclusive federal jurisdiction,” *Just v. Chambers*, 312 U. S. 383, 392, are in no way involved in this legislation.

ARGUMENT

I.

CHAPTER 66, SESSION LAWS OF ALASKA, 1949, AN ACT PROVIDING FOR THE LICENSING OF FISHERMEN IN ALASKA, IS A VALID EXERCISE OF THE LEGISLATIVE AUTHORITY OF THE TERRITORY, AND DOES NOT VIOLATE THE ORGANIC ACT OF ALASKA, THE CIVIL RIGHTS ACT OR THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In the Act of June 26, 1906 (c. 3547, 34 Stat. 478 *et seq.* as amended, 48 USCA §230 *et seq.*), Congress exercised its legislative power over fisheries in the Territory of Alaska by regulating the methods by which fish could be caught and by providing for a system of license taxes on the business of canning,

curing and preserving fish. In 1912 Congress, in transferring legislative power to the Territory, provided in Section 9 of the Organic Act (Act of Aug. 24, 1912, c. 387, §9, 37 Stat. 514, 48 USCA §77) that such power shall extend to all rightful subjects of legislation. Upon this express delegation of legislative authority there were placed some specific limitations, one of which was that the legislature should not have the power to alter, amend, modify or repeal the fish laws of the United States applicable to Alaska. *Organic Act of Alaska*, Sec. 3 (Act of Aug. 24, 1912, c. 387, §3, 37 Stat. 512, 48 USCA §24). In this same section, however, it was further provided that this limitation of authority should not prevent the legislature from imposing other and additional taxes and licenses; and this latter provision, it has been held, constituted an "express and unlimited authority" to tax, *Alaska Fish Co. v. Smith*, 255 U. S. 44, 49, an authority that could validly be extended to the licensing of fishermen. *Anderson v. Smith*, 71 F(2) 493. Chapter 66, Session Laws of Alaska, 1949, is, therefore, fully within the legislative authority of the Territory unless it can be said to contravene the Constitution of the United States, the Civil Rights Act (R.S. §1977, 8 USCA §41), or some provision of the Organic Act of Alaska.

Section 9 of the Organic Act, which appellants maintain is violated by Chapter 66, contains a provision that "all taxes shall be uniform upon the same class of subjects and shall be levied and collected under gen-

eral laws . . .” (Act of Aug. 24, 1912, c. 387, §9, 37 Stat. 514, as amended, 48 USCA §78.) The district court held that this provision does not apply to license taxes (R. 16), but even assuming that it does, such a provision “requires no greater measure of uniformity and equality than does the equal protection requirement of the Fourteenth Amendment.” *Alaska Steamship Co. v. Mullaney*, 180 F(2) 805, 817-818. The same is true as to the requirements of the Civil Rights Act. *Martinsen v. Mullaney*, 85 F. Supp. 76, 79. Consequently, the arguments that the Act contains arbitrary classifications and discriminates against nonresident fishermen should be approached with the assumption that the validity of the Act must be judged by the same standards of equality and uniformity demanded by equal protection that would be applied in the case of similar legislation by a state. *Alaska Steamship Co. v. Mullaney*, *supra*, p. 818.

- A. The classification in the Act between resident and non-resident fishermen is fully justified because of the increased enforcement burden placed on the Territory by the nonresidents.**

The chief objective of taxation being an equitable distribution of the cost of government among those who enjoy its benefits, *Welch v. Henry*, 305 U. S. 134, 144, the equal protection clause of the Fourteenth Amendment logically contemplates rather than forbids the “greatest freedom in classification,” *Madden v. Kentucky*, 309 U. S. 83, 88; because only by classifying for purposes of taxation can true practical

equality be attained. *Adams Express Co. v. Ohio State Auditor*, 165 U. S. 194, 228. Thus there is reason for the rules established by the United States Supreme Court: that a classification in a tax law is valid if it is founded upon a reasonable distinction or if any state of facts reasonably can be conceived to justify it, *Tax Commissioners v. Jackson*, 283 U. S. 527, 537; if it rests upon some ground of difference having a fair and substantial relation to the object of the legislation, *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415, *Louisville Gas & Elec. Co. v. Coleman*, 277 U. S. 32, 37; when the legislature withholds the burden of a tax to foster what it conceives to be a beneficent enterprise, *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 512; or when the classification has a reasonable relation to a legitimate end of governmental action, *Welch v. Henry*, 305 U. S. 134, 144. All that equal protection demands is that the selection of the classes be neither capricious nor arbitrary; if it rests upon a reasonable consideration of difference of policy, then standards of equality are satisfied. *Tax Commissioners v. Jackson*, *supra*, p. 537.

In this case the evidence fully supports a rational basis for the imposition of a higher license tax on nonresident fishermen than on residents. Thousands of nonresident fishermen come to Alaska each year (R. 52-53, 69) and engage in fishing for salmon in Alaska during the fishing season which varies from twenty days in Bristol Bay (R. 11, 80-81) to four or five months elsewhere (R. 10-11), during which time

they enjoy the protection of local government. But in exacting from such nonresidents their fair share of the cost of governmental protection, by the fishermen's license tax, extraordinary and almost insuperable difficulties are encountered by appellee and his agents.

Nonresident trollers come to Alaska each year in their own power boats and fish along the many miles of Alaska coastline. They own no property and have no homes in the Territory (R. 85-86), they are not required by shipping laws to enter or clear upon arrival in or departure from the Territory (R. 107), and their boats are not only large and in first-class shape (R. 101), but are supplied before leaving the States for the fishing grounds in Alaska with necessary staples and fishing gear (R. 99). These non-resident trollers not only neglect to purchase the non-resident fishing licenses, but even deliberately evade such payment by dodging the tax collector (R. 99-107), by warning each other by radiophone of his proximity (R. 99-100, 105) and by purchasing resident fishing licenses (R. 107).

The circumstances, however, with respect to resident trollers are entirely different and no such tremendous enforcement problems must be met. Since the residents have homes in the Territory and live in villages and towns where agents of appellee are situated, it is a simple matter for appellee's deputies to collect the tax before the fishing season opens (R. 97-98). Violators among the residents can easily be

apprehended at their places of residence after the season is closed (R. 108).

Much of the same burden and inconvenience is encountered with respect to collection of the license tax from nonresident gillnet fishermen, trap watchmen and tendermen. Again, these nonresident fishermen will not voluntarily pay the tax, and again, the tax collector must seek them out by the process of covering by boat or airplane many miles of area (R. 109). The efforts to enforce the Act here, however, are even more unlikely to be met with success than in the case of trollers because of the short fishing season of approximately twenty days (R. 80-81). Also, as in the case of the nonresident trollers, the nonresident gillnet fishermen will purchase resident licenses in an attempt to avoid the fee that they are required to pay (R. 109). And there is still difficulty in enforcement with respect to nonresidents employed by canneries in Bristol Bay, where license fees are ordinarily collected for the Territory by the canneries (R. 110). If all the fees from all nonresident fishermen there were collected pursuant to this plan, all would be well, but as the evidence shows, even here there is evasion (R. 110-113). The same situation exists with respect to nonresident trap watchmen employed by canneries (R. 114).

As in the case of the resident trollers, there is no real enforcement problem with respect to resident gillnet fishermen. Those who are not employed by canneries ordinarily purchase licenses before the fishing

season opens (R. 108); and in the cases where canneries deduct the license fees from wages, those persons who have fished only for a short time, from whom no deductions are made by the canneries, and who thus evade payment of the tax, (R. 110-111), are not ordinarily resident fishermen but nonresidents. As the evidence shows, the resident gillnetters who work for canneries during the season at Bristol Bay need licenses to fish in a later season of the year (R. 112).

In view, therefore, of the showing that nonresident fishermen own no property and have no homes or other ties in Alaska, that they come to the Territory only for a relatively short period of time and depart therefrom immediately after the fishing season closes, that they deliberately evade the law by refusing to pay the license tax and by throwing obstacles in the path of the tax collector who must seek them out along the thousands of miles of Alaska coastline, it is little wonder that ninety percent of the cost of collecting the taxes under Chapter 66 is incurred in collecting or attempting to collect them from the nonresident fishermen (R. 21, 120). This certainly constitutes a valid basis for the classification in the Act—one that rests on substantial differences bearing a rational relation to the object of the legislation. *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415; *Louisville Gas & Elec. Co. v. Coleman*, 277 U. S. 32, 37. Administrative convenience and expense in the collection of the tax are alone a sufficient justification for the

difference in treatment given. *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 511; *Madden v. Kentucky*, 309 U. S. 83, 89-90; *South Porto Rico Sugar Co. v. Buscaglia*, 154 F(2) 96, 100. At the very least a state of facts can reasonably be conceived to justify the imposition of a higher tax on nonresident fishermen, *Tax Commissioners v. Jackson*, 283 U. S. 527, 537, and there has been absolutely no showing by appellants that such legislative action constitutes a hostile or oppressive discrimination against them. See *Madden v. Kentucky*, *supra*, p. 88.

B. The classification in the Act is not invalid on the ground that uniformity may not have been achieved with scientific accuracy.

It is not true, as appellants suggest, (Appellants' Brief, pp. 8-10, 14-15) that in order to justify the classification in the Act, appellee must have kept a complete record showing a detailed comparative analysis, between resident and nonresident fishermen, of the myriad items and operations involved in the process of collecting taxes from them, or that he must prove that the differential between the \$50 fee imposed on nonresidents and the \$5 fee on residents is equal to the difference between the cost of collecting the nonresident tax and the cost of collecting the resident tax. Nearly every revenue measure contains classifications, and if in order to write a valid law under requirements of uniformity, the legislature were forced to consider with mathematical exactitude the differences between the classes, then it could hardly

function as a legislature. To interpret uniformity and equality as being such a narrow restrictive limitation on legislative authority would, in effect, be striking at the government's most vital function—its power to raise revenue for its continued existence.

All that is necessary to sustain this classification is the uncontradicted proof that the inconvenience, burden and expense in enforcing the provisions of the Act are substantially greater with respect to non-residents than to residents, and that the relation, therefore, between means and end in this legislative action is not “wholly vain and fanciful, an illusory pretense.” *Williams v. Mayor*, 289 U. S. 36, 42. Equal protection has never demanded that the legislature “maintain rigid rules of equal taxation, . . . resort to close distinctions, or . . . maintain a precise scientific uniformity . . .” *Welch v. Henry*, 305 U. S. 134, 145. It has been repeatedly held that an iron rule of equal taxation is not required by the constitution. *Tax Commissioners v. Jackson*, 283 U. S. 527, 537. See also *Lawrence v. State Tax Commission*, 286 U. S. 276, 284; *General American Tank Car Corp. v. Day*, 270 U. S. 367, 373-374; *Travelers' Insurance Co. v. Connecticut*, 185 U. S. 364; *State Railroad Tax Cases*, 92 U. S. 575, 612.

From the evidence produced by appellee, there is raised a presumption of the constitutionality of the legislature's scheme of attaining its legitimate objective—an equitable distribution of the cost of government. This presumption of constitutionality “can be

overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis that might support it." *Madden v. Kentucky*, 309 U. S. 83, 88. This burden appellants have made no attempt to assume.

Nor are the words "a differential which would merely compensate the State for any added enforcement burden they may impose" taken from the opinion in the case of *Toomer v. Witsell*, 334 U. S. 385, 399, any authority for appellants' view that in order to sustain the tax, the differential must be shown with mathematical certainty to equal the added enforcement cost that nonresidents impose. (See Appellants' Brief, pp. 14-15.) If this is appellants' contention, then what they are really saying is that in the *Toomer* case the United States Supreme Court has overruled a well established, and constantly adhered to, rule of law to the effect that equal protection does not require an iron rule of equal taxation, or that the legislature maintain a precise scientific uniformity and make meticulous adjustments in distributing the burden of government. The Supreme Court could scarcely have intended such a result in the *Toomer* case, for to so hold would be "to subject the essential taxing power of the State to an intolerable supervision, hostile to the basic principles of our Government and wholly beyond the protection which the general clause of the

Fourteenth Amendment was intended to assure." *Ohio Oil Co. v. Conway*, 281 U. S. 146, 159.

Other portions of the *Toomer* opinion should be examined. For instance, on p. 396 the following language appears:

"By that statute South Carolina plainly and frankly discriminates against nonresidents, and the record leaves little doubt but what the *discrimination is so great that its practical effect is virtually exclusionary.*" (Italics supplied)

and on pp. 398-399, the court said:

"Nothing in the record indicates that nonresidents used larger boats or different fishing methods than residents, that the cost of enforcing the laws against them is appreciably greater, or that any substantial amount of the State's general funds is devoted to shrimp conservation. *But assuming such were the facts, they would not support a remedy so drastic as to be a near equivalent of total exclusion . . .* We would be closing our eyes to reality, we believe, if we concluded that there was a reasonable relationship between the danger represented by non-citizens, as a class, and the *severe discrimination* practiced upon them." (Italics supplied.)

Thus the real reason for the holding in the *Toomer* case appears. It was not merely the discrimination against nonresidents that caused the court to hold the South Carolina statute invalid; it was the fact that the discrimination was so great that it had the necessary effect of excluding nonresidents from fishing in that State. No such effect in the principal case is present or is even suggested by appellants. There

is an obvious distinction between a differential of \$2475 in the *Toomer* case and \$45 here. A fee of \$2500 may well be exclusionary, but (as pointed out below in Point II of this brief) it can hardly be contended that a fee of \$50 has the practical effect of depriving appellants' members of their right to fish in territorial waters.

C. The classification in the Act may also be justified as a legitimate means of fostering the development of the Territory.

In some cases a classification of taxpayers may be upheld as having a fair and substantial relation to a constitutional non-fiscal object. *Rapid Transit Corp. v. New York*, 303 U. S. 573, 587. No one could argue that there would be anything unconstitutional in imposing a \$50 license fee on both resident and non-resident fishermen alike, and yet the imposition of only a \$5 fee on the local fishermen engaged in the largest industry in Alaska is nothing more than the encouragement of settlement of the Territory, and must be sustained because fairly related to a legitimate end of governmental action. As Mr. Justice McReynolds stated in *Haavick v. Alaska Packers Assn.*, 263 U. S. 510, at p. 515:

“It (the fishermen’s license tax) applies only to nonresident fishermen; citizens of every state are treated alike. Only residents of the territory are preferred. This is not wholly arbitrary or unreasonable, and we find nothing in the Constitution which prohibits Congress from favoring

those who have acquired a local residence and upon whose efforts the future development of the territory must largely depend."

It is enough, therefore, that the classification is reasonably founded upon or related to some permissible policy of taxation, *Roberts & S. Co. v. Emmerson*, 271 U. S. 50, 57, or that the legislature has decided to withhold the burden of a tax in order to foster what it conceives to be a beneficent enterprise. *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 512. Cf. *Aero Transit Co. v. Georgia Commission*, 295 U. S. 285, 291-292.

II.

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT HAS NOT BEEN VIOLATED NOR HAVE APPELLANTS BEEN DEPRIVED OF THEIR RIGHT TO FISH IN THE WATERS OF ALASKA.

What has been said above with respect to the classification as it relates to equal protection disposes of any contention that the legislative scheme of classification violates due process requirements, *Fox v. Standard Oil Co.*, 294 U. S. 87, 103; *Rapid Transit Corp. v. New York*, 303 U. S. 573, 587, unless it is being asserted that without even considering the amount of the resident fee, the \$50 nonresident fee is so excessive and unreasonable as to amount to a deprivation of property or liberty without due process of law. But even in this respect there is no violation of constitutional guaranties. Due process seldom is a limitation

on the discretion of the legislature in deciding the amount of a tax, unless from an examination of the statute it is clear, beyond any doubt, that the legislature has exercised, not its power of taxation, but some forbidden power such as confiscation of property or regulation of some matter beyond the legislature's concern; and these forbidden powers are not to be implied solely from the burden of the tax. *Magnano Co. v. Hamilton*, 292 U. S. 40, 46-47. In order to justify a court striking down a tax because of its alleged excessive burden, a statute under which the tax is levied must show on its face detailed regulation of a subject beyond legislative power, a showing which cannot be made here. See *Bailey v. Drexel Furniture Co.*, 259 U. S. 20, 42.

Nor is the amount of the nonresident tax so great as to contravene that portion of the White Act which guarantees to every citizen of the United States "the right to take . . . fish . . . in any area of the waters of Alaska where fishing is permitted . . ." (Act of June 6, 1924, c. 272, §1, 43 Stat. 464, 48 USCA §222). A gillnet fisherman who averages net earnings of approximately \$2500 for a fishing season of twenty days (R. 11-13, 17, 80-81), or even a troller who averages approximately \$3500 for a season of four to five months (R. 10-11, 17), can hardly in all seriousness contend that a tax of \$50 is so exorbitant and unreasonable as to "practically prohibit . . . or interfere with the exercise of the right granted by Congress," *Anderson v. Smith*, 71 F(2) 493, 495, particularly in

view of the fact that after the close of one particular fishing area, a fisherman can implement his earnings considerably by fishing in other parts of the Territory (R. 12-13, 86). There is a marked difference between the Alaska nonresidents' fishing tax of \$50 and the \$2500 fee exacted from nonresident fishermen in South Carolina which was found to be unreasonable in *Toomer v. Witsell*, 334 U. S. 385.

III.

THE ACT DOES NOT IMPOSE AN UNCONSTITUTIONAL BURDEN UPON INTERSTATE COMMERCE.

There is nothing in Chapter 66 which can be construed as an attempted regulation of interstate and foreign commerce, either expressly or by reason of constituting an unlawful burden thereon. Fishing is not interstate commerce but is simply a local business subject to local taxation, and is clearly distinguishable from the business of shipping fish in interstate commerce. Cf. *Oliver Mining Co. v. Lord*, 262 U. S. 172, 178-179; *Heisler v. Thomas Colliery Co.*, 260 U. S. 245, 258-259; *Utah Power & Light Co. v. Pfost*, 286 U. S. 165, 182-183; *Western Livestock Co. v. Bureau*, 303 U. S. 250, 258. The taxable event—the taking of the fish—occurs before the fish have entered the flow of commerce. *Toomer v. Witsell*, 334 U. S. 385, 394-395. By no reasonable implication does this tax purport to regulate interstate commerce in fish or to control the movement of fishing vessels therein. *Mirkovitch v. Milnor*, 34 F. Supp. 409, 411.

Appellants' thought that there is a burden on commerce because the tax applies to "sizeable numbers . . . who assist the product in its process through the industry which is admittedly interstate in character" (Appellants' Brief, p. 16) is incorrect. Appellants do not state just who are the "sizeable numbers assisting the product in its process," and there is no showing in this record of any instance where the fisherman's license tax was demanded from one who was engaged in the processing aspect of the fishing industry in Alaska. As the district court pointed out in the case of *Martinsen v. Mullaney*, 85 F. Supp. 76, at p. 78:

" . . . it was the intention of the Legislature to comprehend all those classes identified or connected with the maritime aspect of the industry . . . that is, the taking, handling and delivery of the fish on the grounds, as distinguished from those engaged in shore operations, such as processing, canning and exporting."

Clearly the Act imposes a tax only on the local business of fishing, and does not by any reasonable implication purport to touch the processing part of the fishing industry which begins when the fish are delivered by fishermen to the canneries and cold storage plants.

Nor is there any merit to appellants' contention that the Act burdens interstate commerce because cannery companies are prohibited under Section 5 from employing, or purchasing fish from, fishermen who

are not licensed under the Act (Appellants' Brief, p. 16). Appellants are not cannery companies and are not being prosecuted for violation of Section 5 of the Act. A decision on the constitutional question involved there should await a case where those provisions are specifically applied to one who claims to be injured. *Watson v. Buck*, 313 U. S. 387, 402; *Ashwander v. Tenn. Valley Authority*, 297 U. S. 288, 346-347.

IV.

THE ACT DOES NOT CONSTITUTE AN UNWARRANTED INVASION OF THE ADMIRALTY AND MARITIME JURISDICTION OF THE UNITED STATES.

Although the point has not been argued, appellants do specify in their summary of their Statement of Points (Appellants' Brief, pp. 2-3) that Chapter 66, Session Laws of Alaska, 1949, is unconstitutional in that it violates Article 3(4), Section 2 of the Constitution of the United States. The assertion, however, that there is anything in the Act which runs counter to congressional policy as regards admiralty and maritime jurisdiction and thus adversely affects the uniformity of general maritime law, has already been sufficiently disposed of by this court in the case of *Alaska Steamship Co v. Mullaney*, 180 F(2) 805, 812-814.

Under the Act a tax is imposed upon those engaged in a local business, and the fact that certain fishermen may for some purpose be classed as seamen and thus

able to take advantage of certain congressional acts relating to maritime law, does not mean that they are thus forbidden to contribute to the cost of the local government that offers them protection. Congress, it may be admitted, has manifested its intention to occupy the entire field of general maritime law, but a local occupation tax which has no direct relation to or effect upon navigation or commerce of the sea, which claims nothing against the fishing vessel, which in no way attempts to regulate or interfere with the contract a crew member of a vessel has with its owner, and which has absolutely no effect upon the collection of a seaman's wages, can by no reasonable implication be said to interfere with or hinder congressional objectives in this field. Here the legislature has dealt with matters entirely unrelated to those covered by congressional enactments. The "essential features of an exclusive federal jurisdiction" are in no way involved. *Just v. Chambers*, 312 U. S. 383, 392.

CONCLUSION

Chapter 66, Session Laws of Alaska, 1949, is a valid exercise of the Territory's acknowledged power of taxation. In order to obtain an equitable distribution of the cost of government, the legislature has prescribed a classification that is fully within the bounds of permissible legislative action. Absolute and perfect equality may not have been achieved, but it has never been required that a taxing statute be scientifically accurate. It is sufficient that a fair and reasonable attempt has been made to distribute the burden of government by placing a higher tax on those who impose upon the government additional burden and cost in enforcing the statute under which the tax is levied. Chapter 66, Session Laws of Alaska, 1949, is, therefore, valid in its entirety and the decree of the district court should be affirmed.

Respectfully submitted,

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Juneau, Alaska

For Appellee.

October 1950

APPENDIX A

Chapter 66, Session Laws of Alaska, 1949

* * *

Section 1. For the purposes of this Act, "fisherman" shall mean any person who fishes commercially for, takes or attempts to take salmon, halibut, bottom fish, crabs, clams, or other fishery resources of Alaska, and shall include every individual aboard boats operated for fishing purposes who participates directly or indirectly in the taking of the raw fishery products above mentioned whether such participation be on shares or as an employee or otherwise. The term "fisherman" shall also include trap watchmen or others engaged in operating fish traps as well as the crews of tenders or other floating equipment used in handling of fish.

Section 2. No person shall become engaged as a fisherman as above defined without first obtaining a license so to do. License fees levied upon fishermen are as follows: Resident fisherman, \$5.00; non-resident fisherman, \$50.00. Such licenses shall run for one calendar year, and expire on December 31st of each year. For the purposes of this Act, a resident shall be any citizen who has resided in the Territory for 12 months immediately preceding application for such license and shall have been a bona fide inhabitant of Alaska for at least six months during each calendar year thereafter, and who maintains his place of abode in Alaska. A non-resident is a citizen who has not resided in Alaska for the 12 months im-

mediately preceding application for license or who maintains his principal business or place of abode outside of the Territory. Any person not a citizen of the United States is deemed to be an alien unless he possesses a valid declaration of intention to become such citizen.

Section 3. Licenses to fish shall be issued by the Tax Commissioner pursuant to written applications containing such information as may be required by the Tax Commissioner, and such licenses may also be issued by his deputies. * * *

Section 4. The Tax Commissioner is hereby authorized to appoint United States Commissioners, cannery or cold storage agents, fish buyers or other persons as his agents to take applications, issue the licenses and collect license fees hereunder, and with respect to such persons not employed on salary by the Tax Department, the Tax Commissioner is hereby authorized to establish reasonable and uniform rates of compensation for such services on a commission basis for issuance of each resident and non-resident license. The United States Commissioners and other agents shall monthly transmit to the Tax Commissioner all fees collected by them, less their authorized commissions, together with a full account of same. The Tax Commissioner shall not be liable for defalcation or failure to account for the fees so collected by any such agent, but shall require a bond in such sum as he may deem adequate, conditioned upon faithfully accounting for all moneys collected hereunder.

Section 5. It shall be unlawful for any person, association or corporation, or for the agent of any person, or for the officer or agent of any association or corporation, to have in his, their or its employ any fisherman who is not duly licensed under this Act or to purchase fish from any fisherman who is not so licensed. Each buyer of the fish shall keep a record of each purchase showing name of boat from which the catch involved is taken, amount purchased, and the names of all persons attached to the boat who participated in the trip on which the fish or shellfish were taken. Such records may be kept on forms provided by the Tax Commissioner, but must be kept in any event, and each person charged with keeping such records must report same to the Tax Commissioner in accordance with rules and regulations promulgated by him. Anyone violating any of the provisions of this section shall be guilty of a misdemeanor, and upon conviction, punishable under the penalty clause of this Act.

Section 6. (a) The Tax Commissioner's deputies shall have full power to enforce this Act. Likewise the agents of the Fish and Wildlife Service, Department of the Interior, are hereby fully authorized to enforce this Act. (b) Licenses shall be subject to inspection, and shall, upon request by any officer authorized to enforce this Act, be exhibited to him. Failure to procure or exhibit such license as indicated above or otherwise comply with this Act shall be a misdemeanor, and upon conviction thereof the offen-

der shall be subject to a fine not exceeding \$500.00 or imprisonment not to exceed six months, or to both such fine and imprisonment.

Section 7. This Act shall not apply to fishing for personal consumption but shall apply only to fishing for commercial purposes; * * *

* * *

Section 9. If any provisions of this Act, or the application thereof to any person or circumstance is held invalid, the remainder of the Act and such application to other persons or circumstances shall not be affected thereby.

Section 10. An emergency is hereby declared to exist and this Act shall take effect immediately upon its passage and approval.

Approved March 21, 1949.

APPENDIX B

Act of Aug. 24, 1912, c. 387, §9, 37 Stat. 514, as amended,
48 USCA §78.

All taxes shall be uniform upon the same class of subjects and shall be levied and collected under general laws, and the assessments shall be according to the true and full value thereof. * * *

~~ORIGINAL~~

Docketed

No. 12586

In The United States
Court of Appeals
For the Ninth Circuit

OSCAR ANDERSON and ALASKA FISHER-
MEN'S UNION, *Appellants,*

vs.

M. P. MULLANEY, Commissioner of Taxation of the
Territory of Alaska, *Appellee.*

Upon Appeal from the District Court for the
Territory of Alaska, Division Number One

Reply Brief for the Appellants

ROY E. JACKSON & CARL B. LUCKERATH
WM. L. PAUL, JR.,

For Appellants.

PAUL P. O'BRIEN

CLERK

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Reply Brief for the Appellants

Appellee, in his brief, does not attempt to refute appellants' Point 1 (and argument thereunder pp. 7-10 of appellants' brief) that the trial court's finding, that 90% of the cost of collecting the tax is incurred in attempting to collect the tax from non-resident fishermen, is unsupported by the record and clearly erroneous. We take it that appellee concedes this contention to be correct. The appellee argues, however, that the expense and difficulty in attempting to collect the tax from non-

resident fishermen justifies the territorial legislature's separate classification between residents and non-resident fishermen, and that the mere fact that the legislature did not achieve mathematical precision or perfect uniformity between the additional enforcement cost and the additional amount of tax does not make the Act invalid.

Appellants respectfully submit that the appellee has overlooked and failed to consider the effect of some essential facts as disclosed by the record, and has misconstrued and attempted to unduly extend the holdings and dicta of some of the cases cited in his brief.

I.

THERE IS NO VALID BASIS FOR THE DISCRIMINATION AGAINST NON-RESIDENT FISHERMEN BASED UPON AL- LEGED ADDITIONAL ENFORCEMENT BURDENS.

A.

The record does not show any actual additional expense incurred in collecting and enforcing the non-resident fishermen's tax as compared with the resident fishermen's tax.

It is true that appellee's witness, Thomas Parke, who is the territory's special deputy enforcement officer, testified that he had found it much more difficult to enforce the tax law against non-resident fishermen and that most of his time was spent with non-resident fishermen. But he also testified that his employment (and

presumably his salary) would continue even if there were no non-resident fishermen (R. 121).

Appellee, M. P. Mullaney, the Commissioner of Taxation, in response to appellants' interrogatories, stated in very general terms (R. 29-30) that it was more difficult and expensive to collect the tax from non-resident fishermen. However, he stated that he was unable to determine from the departmental records any answers to specific interrogatories (R. 33-34) propounded by appellants, which answers would have shown the amount or proportion of this additional expense, if such there was.

Thus the only alleged additional enforcement burden shown by the record is at best based upon mere conclusions and conjectures of appellee's interested witnesses.

B.

If there is any additional enforcement burden it is the result of the discrimination.

Appellee argues that the discrimination against non-resident fishermen is justified because of the added expense of enforcing the tax against that class. Even assuming, momentarily, that the record sufficiently shows some additional expense or difficulty of enforcement against non-resident fishermen, the record also shows clearly that such additional expense is caused by the very discrimination which it is said to justify. The deputy enforcement officer, Parke, testified that "lots

of" non-resident fishermen "evaded the tax by purchasing resident licenses" (R. 107, 109).

And the trial court stated in its opinion (R. 17) "... often there is a claim of local residence." Appellee, in his brief (at pp. 11, 12) also cites these instances of purchases of resident licenses by non-resident fishermen as proof of the difficulty of enforcement and wholesale evasion justifying the added tax.

Actually such instances constitute the most compelling proof that but for the discriminatory rate against non-residents the so-called added enforcement burden would disappear. This sort of circular reasoning, if accepted by the court, would permit the legislatures of Territories and States alike to evade the requirement of the equal protection clause of the Fourteenth Amendment, of the Civil Rights Act, and of the Commerce Clause, simply by imposing a higher tax on non-residents or non-citizens or other groups and then justifying the discriminatory additional tax because of the not unnatural fact that it would be more difficult to collect. In short, an unconstitutional tax would become constitutional simply because the unconstitutional tax was more difficult to enforce.

C.

Even assuming some valid basis for discrimination, there is no conceivable basis for the amount of differential imposed by the Act.

Assuming *arguendo*, that some small extra tax differential might be imposed on non-resident fishermen based upon a valid additional enforcement burden, the differential in the statute here under consideration—ten times the amount of the tax on resident fishermen—is patently an arbitrary discrimination against non-residents contrary to the clear term of the Civil Rights Act and without any conceivable basis in fact. Appellee argues (at pp. 14-18 of his brief) that the classification in the Act is not invalid on the ground that uniformity may not have been achieved with scientific accuracy. Appellants recognize, of course, the validity of this general rule of law, but the apparent persuasiveness of appellee's arguments, when applied to the facts of the instant case, becomes more superficial than real. In our opening brief (pp. 14-15) we demonstrated the absurdity of the argument that any appreciable portion of the extra tax imposed against non-residents could be justified as representing actual or conceivable additional cost of enforcement. The differential of a five dollar resident license to a fifty dollar non-resident license must be based, under appellee's theory, upon the supposition that the territorial legislature could reasonably believe that it would cost at least \$45.00 to collect a \$5.00 tax. We respectfully suggest that the Act not only fails to achieve precise scientific uniformity and accuracy but further that it does, upon its face and upon the record, meet appellee's own test of invalidity

in that the tenfold differentiation is “wholly vain and fanciful, an illusory pretense.”

An analysis of the cases cited on page 15 of appellee’s brief will demonstrate the tenuous character of appellee’s claim that those cases sustain the validity of the tax here in dispute.

Williams v. Mayor, 289 U.S. 36, upheld the validity of a State Statute exempting one railroad from certain taxes, where the statute showed on its face that it was a “reasonable exemption in furtherance of the public good”; this because the railroad was failing financially and its continued operation was necessary to the public. The Court said (at page 42) concerning the legislature’s discretion, “Within the field where men of reason may reasonably differ, the legislature must have its way.” We contend that the legislature could not reasonably assume the cost of enforcing the license tax could possibly amount to ten times the amount of the tax, and that the added tax against non-residents is clearly an unjustified and arbitrary discrimination.

In *Welch v. Henry*, 305 U.S. 134, also cited by appellee, the Court merely upheld validity of a state tax which operated retroactively against corporate dividends. The Court, in addition to the words quoted by appellee concerning “precise scientific uniformity,” also stated “Possible differences in tax burdens, not shown to be substantial, or which are based on discrimination not shown to be arbitrary or capricious, do not

fall within the constitutional prohibition." Here the discrimination is substantial and its amount must be the result of arbitrariness or caprice.

Lawrence v. State Tax Commission, 286 U.S. 276, merely upheld the validity of a state statute which taxed the income of its residents but exempted corporate income earned outside the state. *Tax Commissioners v. Jackson*, 283 U.S. 527, also cited by appellee, is equally inapposite. It upheld an occupational tax levied on each individual chain store.

General American Tank Corporation v. Day, 270 U.S. 367, cited by appellee, supports appellants. In that case the State of Louisiana imposed a tax of 25 mills per dollar on the rolling stock of non-resident corporations operated within the state and exempted all who paid such tax from local taxation which would have amounted to about the same rate. The constitutionality of the tax was assailed on the ground that it constituted a discriminatory denial of equal protection because the local taxes in lieu of which the 25 mill tax was assessed actually amounted to only 21 mills. The Supreme Court said (at p. 373) "In the absence of a purpose to discriminate disclosed by the legislation itself, we are not prepared to say that a four mills variation in one year not shown to be a necessary or continuing result of the scheme of taxation adopted, would be an unconstitutional discrimination; for in such a scheme . . . however fairly devised, it would be impossible to provide

in advance against occasional inequalities as great as that here complained of." The Court then went on to say that the record did not substantiate the alleged four mill discrimination, and that "The appellant has, therefore, failed to show that the tax is discriminatory either in principle or in its practical operation and has laid no foundation for assailing its constitutionality."

In the instant case, contrary to the facts of the *General American Tank Car* case, *supra*, the actual discrimination is disclosed on the face of the legislation itself, the variation is substantial and is a necessary and continuing result of the scheme of taxation adopted, and the tax is discriminatory both in principle and in its practical operation.

Appellee argues that our reliance upon the words "a differential which would merely compensate the State for any added enforcement burden they may impose," from *Toomer v. Witsell*, 334 U.S. 385, 399, means that we think such differential must be shown with mathematical certainty to equal the added enforcement cost. As shown above we do not contend that the legislature need achieve mathematical certainty, but merely that some reasonable degree of relationship between the added cost and added tax must be present. Appellee further contends that the true rule of the *Toomer* case is that a discrimination is not invalid unless it has the effect of excluding non-residents altogether, or nearly so. It is appellee's interpretation of the *Toomer* decision, not

ours, which would overrule a long line of decisions.

In several cases, the Supreme Court has invalidated taxes which discriminated against non-residents without any sort of requirement that the discrimination be so great as to exclude non-residents. Thus in *Bethlehem Motor Corp. v. Flynt*, 256 U.S. 421, the Supreme Court held unconstitutional a state tax which imposed a license of \$500 on manufacturers of automobiles who engaged in the business of selling them within the state, but merely imposed a license of \$100 on manufacturers of automobiles if three-quarters of their assets were located within the state. The Court said (at p. 426) "The condition can be satisfied by a resident manufacturer, his factory and its products being within the State; it cannot be satisfied by a non-resident manufacturer . . . Therefore there is a real discrimination and an offense against the Fourteenth Amendment." *Chalker v. Birmingham & N. W. R. Co.*, 249 U.S. 522, held unconstitutional a state statute which imposed a license of \$100 on foreign construction companies doing business within the state whose chief office was outside the state, and a license of \$25.00 on domestic or foreign construction companies doing business within the state whose chief office was within the state. The Court said that ordinarily out-of-state corporations would have their chief office outside the state while domestic corporations' chief offices would be within, and that (at p. 527) "Practically, therefore, the statute under consid-

eration would produce discrimination against citizens of other states by imposing higher charges against them than citizens of Tennessee are required to pay.” It need scarcely be said that neither the \$500 tax against non-resident automobile manufacturers in the *Bethlehem Motor* case, nor the \$100 tax against out-of-state construction companies in the *Chalker* case, would in any sense exclude the corporations from doing business therein.

Suffice it to add that appellee has not cited any cases, nor have appellants discovered any, in which additional enforcement costs have been held to justify or validate a tax discrimination against non-residents.

II.

THERE CAN BE NO LEGITIMATE ENCOURAGEMENT OF THE DEVELOPMENT OF THE TERRITORY BY MEANS OF TAX DISCRIMINATION.

The classification in the Act may not be justified as a legitimate means of fostering the development of the Territory. Appellee’s argument to the contrary simply ignores the specific provisions of the Civil Rights Act (Appendix B, appellant’s opening brief) that “All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . and shall be subject to like . . . taxes, licenses and exactions of every kind, and to no other.” Any attempt to encourage development of

the Territory by imposing lower taxes on residents than on non-residents for the same activity, as was done here, would clearly constitute an unlawful discrimination. As pointed out by Judge Folta in *Martinsen v. Mullaney*, 85 F. Supp. 76 (see p. 11, appellant's opening brief), *Haavick v. Alaska Packers Assn.*, 263 U.S. 510, and other cases relied upon by appellees, overlooked the provisions of the Civil Rights Act.

III.

APPELLANT HAS SUSTAINED ITS BURDEN OF PROOF.

Appellee relies heavily and almost exclusively on presumptions of constitutionality and validity. While some of the language from the cases, as quoted by appellee (e.g., "The burden is on the one attacking the legislative arrangement to negative every conceivable basis that might support it."—p. 16, appellee's brief), might seem so broad as to in effect establish an almost conclusive presumption of validity, the actual holdings of the cases clearly demonstrate that the courts will not uphold discriminatory legislation on the basis of imaginary or illusory suppositions such as are tendered by appellee. For example, if the Court in the instant case can presume that the difficulty of enforcement of non-resident fishermen license justifies a tax ten times greater than that imposed on residents, the Supreme Court in *Chalker v. Birmingham & N. W. R. Co.*, could equally well have presumed that the difficulty of enforcing the tax on foreign corporations justified the

license which was four times that of domestic corporations, or it could have presumed that a substantial number of foreign corporations doing business within the state had their chief offices within the state, and therefore could qualify for the lower rate. However, the Supreme Court indulged in no such flights of fancy but based its decision upon reason and practicality, saying "Practically, therefore, the statute under consideration would produce discrimination against citizens of other states . . ."

If it is appellee's contention that appellants must show the exact ratio of expense attributed to collection of non-resident taxes as contrasted with expense attributed to cost of collection of resident taxes, we call the court's attention to the fact that appellee himself has foreclosed that possibility by keeping such inadequate records that not even he could compute those statistics. The Commissioner should not be allowed to successfully forstall attacks on the validity of a discriminatory tax by failing to maintain adequate records and then asserting in most general terms that the discrimination complained of is justified by the difficulty and expense of collection.

The Act upon its face shows a real, substantial and continuing discrimination against non-residents of the Territory of Alaska. No justification appears either in the Act or in the record herein for this discrimination or particularly for the highly excessive and arbitrary amount thereof.

CONCLUSION

For the reasons shown in appellants' opening brief, and in this its reply brief, it is respectfully submitted (1) that the decree of the District Court should be reversed to the extent that it holds Chapter 66, Session Laws of Alaska, 1949, as a valid Act, and (2) that the case should be remanded to the court for entry of a decree enjoining appellee from further collection of taxes under said Act, particularly with respect to non-residents, and directing the refund of taxes theretofore illegally collected thereunder.

WILLIAM PAUL, JR.,

ROY E. JACKSON,

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No. 12588

United States
Court of Appeals
for the Ninth Circuit.

MARGARET BRYAN SMITH,

Appellant,

vs.

HARRY C. WESTOVER, United States Collector
of Internal Revenue, Sixth Collection District
of California,

Appellee.

Transcript of Record

Appeal from the United States District Court,
Southern District of California,
Central Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the District Court of the United States for the
Southern District of California, Central Di-
vision

No. 8060-PH Civil

MARGARET BRYAN SMITH,

Plaintiff,

vs.

HARRY C. WESTOVER, UNITED STATES
COLLECTOR OF INTERNAL REVENUE,
6TH COLLECTION DISTRICT, CALIFOR-
NIA,

Defendants.

COMPLAINT FOR REFUND OF OVERPAY-
MENT OF INCOME TAXES WRONG-
FULLY COLLECTED

Plaintiff complains of defendant and alleges:

I.

The grounds upon which the Court's jurisdiction
in this suit depends are as follows:

(a) This action arises under the Constitution of
the United States, and more especially under the
Fifth Amendment and the Sixteenth Amendment
to said Constitution, and under the laws of the
United States providing for internal revenue by
way of income taxes upon individuals, and more
especially under section 162 of the Internal Rev-
enue Code of the United States, as hereinafter ap-
pears.

(b) By this suit the plaintiff seeks to recover

from the defendant, Collector of Internal Revenue, \$13,872.61 as the unpaid balance of an overpayment of \$14,510.27 which was erroneously made by plaintiff to the defendant of a federal income tax, which tax [3] is claimed to have arisen under said laws of the United States and which was collected by said defendant from plaintiff upon alleged income claimed by defendant and by the Commissioner of Internal Revenue of the United States to have been received by her during the year 1944 and to have been includible as such in her income tax return for that year. Said defendant, at the time of such payment, was, ever since has been, and still now is, the duly appointed, qualified, and acting United States Collector of Internal Revenue for the 6th Collection District, California, he being still in said office, and an inhabitant and resident of the Southern District of California. Thereafter said sum was by him turned over to and deposited with the Treasurer of the United States. This suit is filed in support of a claim for such refund which was duly and timely filed, as hereinafter alleged; and this suit is timely brought, as hereinafter alleged.

II.

John B. Bryan died September 18, 1938, a resident of California, leaving a will, a true copy of which is set forth in Exhibit "A" constituting a part of Exhibit 1 hereto attached, which Exhibit 1 is a copy of said Claim for a Refund. On October 13, 1938, an order was duly given and made by the Superior Court for Los Angeles County, Califor-

nia, in a proceeding entitled in said Court "In the Matter of the Estate of" said deceased, whereby said will was duly admitted to probate. Thereafter, such proceedings were had in said Court in said matter that, on December 29, 1943, an order and decree was duly given and made by said Court, in the matter of said Estate, settling the 6th and final account of the Executors of said will and directing a final distribution of said estate, a copy of which said order and decree is set forth in Exhibit "B" constituting a part of said Exhibit I hereto attached. In and by said order and decree of distribution a large quantity of valuable property, in accordance with the terms of said will, was [4] distributed to the Security-First National Bank of Los Angeles, a national banking association organized under the laws of the United States, with its principal office at Los Angeles, California, and to Margaret Bryan Smith, as trustees upon the trust therein set forth in accordance with the provisions of said will. Said Margaret Bryan Smith is the daughter of said decedent and the same person as Margaret Bryan Smith suing herein, in her individual capacity as plaintiff. Said trustees entered upon the discharge of their duties as such, and, ever since said date, they have been the duly appointed, qualified, and acting trustees of said trust.

III.

In and by the terms of said trust, as set forth in said order and decree of final distribution and in said will, there was no provision for any distribu-

tion, during the life of the plaintiff, to any beneficiary under said trust other than the plaintiff; and it was provided that, during the life of the plaintiff, the net income of said trust, computed as therein defined, should not be distributed as such to anyone but should be retained by the trustees and that, immediately upon its receipt, it should be added to the corpus of said trust, and that thereafter the said income should be considered as corpus. In and by the terms of said trust, as set forth as aforesaid, it was also provided that, beginning from the date of distribution of the estate of said deceased to the Trustees, the Trustees should pay the plaintiff, during her life, each year, monthly if possible, five per cent (5%) of the fair market value of the corpus of said trust estate so consisting and to consist of the original corpus and of any accretions thereto, and of any additions thereto by way of net income therefrom added thereto, said 5% to be computed on the market value of such corpus as determined by an annual appraisal at the times and in the manner set forth in said order and decree of distribution. The said provisions of said will are set forth [5] in detail in Article VII of said will (Exhibit A of Exhibit 1) and in that part of said order and decree of distribution designated therein as "Art. VII (of will)" (Exhibit B of Exhibit 1).

IV.

During the year 1944, the said Trustees received from the trust estate, net income as defined generally by the Internal Revenue Code which, minus any deductions provided for in subsections (b) and

(c) of said sec. 162 (there were no such deductions), exceeded \$18,356.36; and, during said year, they received from the trust estate, income in excess of \$18,356.36 which, under the applicable law of estates and trusts of the State of California, would have been considered income available for distribution to any life tenant, legatee, or beneficiary if the will or trust provisions and decree of distribution had provided for a distribution out of income. But, because the provisions of said trust and of said decree of distribution did not provide for any distribution to be made out of the income of said trust before the addition of such income to corpus and because, therefore, any distribution to plaintiff, as the sole beneficiary to whom distribution could be made in 1944, necessarily, according to the terms of said trust, was required to be made solely out of corpus so composed of both original or changed and changing corpus as aforesaid, there was no income received by the trustees, during said year 1944, which, during said year, under said order of distribution and the resulting applicable law of California as regards said trust, was, or could be, considered income available for distribution. Accordingly, pursuant to the said provisions of said trust, upon said income being received and derived by the trustees, during the year 1944, they immediately added the same to the corpus of said trust estate.

V.

Five per cent (5%) of the value of said trust estate computed under the provisions of said trust,

amounted to \$18,356.36 [6] for the year 1944; and, accordingly, under the provisions of said trust, during said year, the trustees paid to the plaintiff sums totaling \$18,356.36, out of said trust estate, which said sum was received by her during said year as aforesaid, but not out of income and only out of the original corpus or out of the changed and changing corpus of said trust estate, made up in accordance with the said provisions of said trust.

VI.

On or before March 15, 1945, to wit, on March 8, 1945, plaintiff duly filed with the defendant as United States Collector of Internal Revenue at Los Angeles, California, he and she being then and ever since residents of Los Angeles and citizens of the United States and of California, her income tax return for the year 1944. In said return she reported \$45,086.99 as her adjusted gross income for said year. Thereby she erroneously included therein said \$18,356.36 as income which she had received from said trust, whereas, in fact and in law, she had not received the same as an income distribution from said trust, and the same was not income received by her, but was a distribution to her solely out of said corpus of said trust as so constituted during said year, and she should not have included the same in said return at all. By reason of the premises she reported a tax computation of her income tax for said year in said return at \$22,388.23, which was a correct statement of said tax if said \$18,356.36 was includible in her income, whereas, in

fact and in law, her adjusted gross income should have been returned at \$26,730.63, without the inclusion of said sum, and her said tax should have been returned at \$8,513.82, which would be a correct statement of said tax if said sum is not includible in her income. A true copy of said return is set forth in Exhibit "C" constituting a part of said Exhibit 1, hereto attached.

VII.

Plaintiff, erroneously and in good faith, made estimates of [7] her income tax for the year 1944 and paid the amount of said estimates to the defendant on account of her income tax for said year, and thereby paid him on account of said tax the total sum of \$23,024.09, as follows:

On Apr. 12, 1944,.....	\$5,364.98
On June 1, 1944,.....	5,364.98
On Sept. 13, 1944,.....	5,364.98
On Jan. 13, 1945,.....	6,929.15
Total	<u>\$23,024.09</u>

Thereby the plaintiff erroneously overpaid her income tax for said year, and the defendant wrongfully, illegally, and erroneously received and collected an excessive amount in excess of the true amount legally and properly receivable and collectible from her, to the extent of the difference between said amount paid in the sum of \$23,024.09 and the amount which should have been paid in the sum of \$8,513.82, to wit, to the extent of \$14,510.27.

VIII.

Thereafter, promptly upon discovering said error, and on May 6, 1946, and within three years from the time of the payment of the first of said payments, and within three years from the time when said income tax return was filed, a claim by her for a refund of said \$14,510.27, as an overpayment and as an erroneous, illegal, and wrongful collection of income taxes from her by defendant, was duly filed by plaintiff with the Commissioner of Internal Revenue of the United States, by her filing the same with the defendant as Collector, as aforesaid, for said Commissioner, all of which was done according to the provisions of the laws of the United States in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof, which said claim for refund presented the same grounds for such refund as those herein asserted. Thereafter, said claim was received by said Commissioner and disallowed by him in its entirety and said income tax return was accepted [8] and approved as rendered and plaintiff's tax assessed and determined by said Commissioner as therein returned. Thereby, the plaintiff was erroneously, illegally, unlawfully, and wrongfully required to pay \$14,510.27 more in income taxes for said year 1944 than were or are required by her by law. Thereafter, and on December 23, 1947, a notice of such disallowance of said claim for refund was mailed to the plaintiff by said Commissioner by registered mail, and this suit is brought after the expiration of more than six months from the date of the filing of

said claim and before the expiration of two years from the date of said mailing of said notice of said disallowance. A true copy of said Claim for Refund is hereto attached marked Exhibit 1. All of the facts stated in said Claim for Refund are true. A true copy of said notice of disallowance is hereto attached marked Exhibit 2.

IX.

In said return for the year 1944, plaintiff returned her said income tax at \$22,388.23 as aforesaid and the payment of \$23,024.09 as aforesaid, and she showed a resulting overpayment of only \$635.86. In said return plaintiff directed that said overpayment be credited on her 1945 estimated tax. This was accordingly done. But, except as above credited, no part of said overpayment of \$14,510.27 has ever been paid or credited and there is now justly due and owing from the defendant to the plaintiff the sum of \$13,874.41 as the unpaid balance of said overpaid and wrongfully collected excessive income taxes for the year 1944.

X.

The defendant and said Commissioner would concede that, except for the provisions of I. R. C. section 162, as amended in 1942 by the provisions now found in subdivision (d) thereof, the cases of *Helvering v. Pardee*, 290 U. S. 365 and *Burnett v. Whitehouse*, 283 U. S. 148, would apply and that the payment of said distribution to plaintiff in the sum of \$18,356.36 would be a receipt [9] by the plaintiff as a legatee and a receipt from corpus and

not a receipt of income. But the defendant and said Commissioner claim that, under said section as amended, said sum can be treated as paid and received out of income and taxable as such, and that said amendment is applicable although, according to the provisions of said trust, no part of such payment was to be made out of income before such income was made a part of corpus according to the terms of said trust. Plaintiff asserts, on the contrary, that (a) the provisions of said section, if attempting to apportion a distribution from a trust as between corpus and income, are unintelligible and provide no workable or understandable guide, or any guide, for making such apportionment; and that (b) if said section is susceptible of any construction which is intelligible, the formula therein set forth for such apportionment is not one providing fairly, accurately, substantially, or at all logically for any apportionment based upon any true, real, or probable income distributed or distributable, or upon any relationship between the contribution of income and corpus to any distribution, or for any apportionment except upon a purely arbitrary basis without support in any logic or reason; and that (c) it provides, by mere legislative fiat, that a payment which is not a distribution of income to a beneficiary of a trust can be treated as income and that a distribution of that which, in its inherent nature as well as that which by its designation as such according to the trust provisions, is corpus can be treated as a distribution of income. Thereby, by the application of said statute by defendant and by

said Commissioner in the premises, as so construed by them, plaintiff is denied the equal protection of the law and her property is taken without due process of law and she is taxed as under an income tax under XVIth amendment upon the basis of items not received as income being includible and included in income. Plaintiff further says that said statute, properly construed and to save its constitutionality, is limited, [10] at most, to an attempted apportionment of a distribution to a trust beneficiary as between corpus and income where, according to the terms of the trust and the resulting applicable law of the State of California concerning trusts, the distribution can be made out of income as such and not merely out of corpus some portion of which corpus is traced, or may be traceable, back to an addition or additions to original corpus from income whereby such income became merged in corpus and lost its character as income.

Wherefore, plaintiff prays for judgment against the defendant in the sum of \$13,878.41, together with interest thereon at the rate of six per cent (6%) per annum on \$1,578.48 thereof from June 1, 1944; on \$5,364.98 thereof from September 13, 1944, and on \$6,929.15 thereof from January 13, 1945, until the date of judgment herein, and for interest on the amount of said judgment until paid; and for her costs and for such other or further relief as may be proper.

Dated this 28th day of February, 1948.

/s/ RALPH W. SMITH.

State of California,
County of Los Angeles—ss.

Margaret Bryan Smith, being first duly sworn on her oath, deposes and says: that she is the plaintiff in the foregoing complaint; that she has read said complaint and knows the contents thereof and that the same is true of her own knowledge, except as to those matters which are therein stated on her information or belief, and as to those matters she believes it to be true.

/s/ MARGARET BRYAN SMITH,

Subscribed and sworn to before me this 28th day of February, 1948.

[Seal] /s/ BETTY K. CHAMBERS,
Notary Public in and for the County of Los Angeles, State of California. [11]

Exhibit No. 1

CLAIM

To be filed with the Collector where assessment
was made or tax paid

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

- ☒ Refund of Tax Illegally Collected.
- ☐ Refund of Amount Paid for Stamps, Unused, or Used in Error or Excess.
- ☐ Abatement of Tax Assessed (not applicable to estate or income taxes).

Collector's Stamp: Received May 6, 1946, Coll.
Int. Rev., Los Angeles, Cal., Teller V.

State of California,
County of Los Angeles—ss.

Name of taxpayer or purchaser of stamps: Margaret Bryan Smith.

Business address: c/o Ralph W. Smith, 617 S.
Olive St., Los Angeles 14, Calif.

Residence: 710 South Orange Grove, Pasadena,
California.

The deponent, being duly sworn according to law,
deposes and says that this statement is made on be-
half of the taxpayer named, and that the facts given
below are true and complete:

1. District in which return (if any) was filed:
6th, California.
2. Period (if for income tax, make separate
form for each taxable year) from January 1, 1944,
to December 31, 1944.
3. Character of assessment or tax: Incomes taxes.
4. Amount of assessment, \$23,024.09; dates of
payment 4/12/44—6/1/44—9/13/44—1/13/45.
5. Date stamps were purchased from the Gov-
ernment
6. Amount to be refunded (or such greater sum
as is legally refundable): \$14,510.27.
7. Amount to be abated (not applicable to in-
come or estate taxes) \$ Interest thereon.

8. The time within which this claim may be legally filed expires, under Section 275 of the Revenue Act of 1942, on or about March 3, 1948.

The deponent verily believes that this claim should be allowed for the following reasons:

Note: See the typewritten portion of Claim for Refund on following pages 11, 12.

/s/ MARGARET BRYAN SMITH.

Sworn to and subscribed before me this 4th day of May, 1946.

[Seal]

RALPH W. SMITH,
Notary Public.

1. On the 18th day of September, 1938, John B. Bryan died leaving a Will, a copy of which is attached hereto as Exhibit A and is made a part of this claim for refund as completely as if set out in full herein.

2. The said Will was duly admitted to probate in the Superior Court of the State of California, in and for the County of Los Angeles, on the 21st day of September, 1938.

3. On December 29, 1943, the Superior Court of the State of California, in and for the County of Los Angeles, issued an Order settling the sixth and final account of Margaret Bryan Smith and Security-First National Bank of Los Angeles, as Executors, and for the payment of statutory fees and order for final distribution of the Estate of John B. Bryan, deceased, a copy of which is attached hereto

as Exhibit B, and is incorporated herein as completely as though fully set out herein.

4. In the above-mentioned Order and Decree for Final Distribution, a trust was set out in which Margaret Bryan Smith and the Security-First National Bank of Los Angeles were appointed as Co-Trustees.

5. In due course the Trustee began to function and to administer the trust, and the income and corpus of the trust were distributed to the beneficiaries of the trust. Among the beneficiaries of the trust was Margaret Bryan Smith, claimant in this claim for refund.

6. The paragraphs of the trust instrument which are pertinent to the present claim are the following:

“Article VII.

(of the Will, as set out in the Decree)

“Definition of Net Income: From the gross income received and derived from the trust properties and/or from the principal thereof, if the Trustees deem that necessary, said Trustees shall first fully pay and discharge any and all taxes, assessments (both general and special), including governmental charges and costs, attorneys’ fees, expenses and liabilities incurred by [13] them as such Trustees, or to which they may be entitled or which they may incur in connection with the care, administration, management, protection, preservation, or distribution of said trust property, including a reasonable compensation to said Trustee for their

services as Trustees hereunder. The remaining income shall be net income, withheld, accumulated or payable as follows:

“(a) The net income received and derived from the trust estate shall be by said Trustees, during the natural life of his daughter, Margaret Bryan Smith, retained by them and as and when received immediately added to the principal or corpus of said trust and thereafter such income and profits shall be considered as principal of said trust.

“(b) Said Trustees, beginning from the date of the distribution of the estate to them as Trustees, shall pay each year in convenient installments, monthly if possible, to his said daughter, Margaret Bryan Smith, during the term of her natural life, five per cent (5%) of the fair market value of the corpus of said trust. In determining the fair market value of the corpus of said trust and the percentage thereof herein directed to be paid to his said daughter, the said Trustees yearly on the anniversary date of his death shall cause to have the then trust corpus appraised by a banking institution or trust company in the County of Los Angeles, and for the year immediately following shall accept this said appraisal and pay to his said daughter five per cent (5%) thereof for each respective annual period. Upon the unanimous consent of the Trustees the Corporate Trustee may act as the Appraiser.

“(c) From and after the death of his said daughter the surviving Trustee shall pay and distribute the entire net income from said trust estate in equal parts, share and share alike, to the then living children of his said daughter and the issue of any one of them who may have deceased, per stirpes, and to the lineal descendants of any deceased issue of theirs by right of representation, [14] so long as the last one of the children of his said daughter, to wit, Grace Patricia Smith and Margaret Joan Smith, now living shall live.”

7. Pursuant to the provisions of the above quoted paragraphs of the above-mentioned Decree, the Trustees of said Trust distributed to claimant, Margaret Bryan Smith, the sum of eighteen thousand three hundred fifty-six dollars and thirty-six cents (\$18,356.36) out of the corpus of said trust during the calendar year 1944.

8. Claimant made out an income tax return for the calendar year 1944.

Said income tax return and the income tax payments under it were received and accepted by the Treasury Department, Internal Revenue Service, and no part thereof has been refunded to the claimant.

9. Claimant reported the sum of \$45,086.99 as adjusted gross income in said return.

10. Claimant included in her income tax return for 1944 the sum of \$18,356.36, which she had received from the corpus of said trust, and denomi-

nated said sum as income received by her during the calendar year 1943. (See copy of income tax return attached hereto as Exhibit C.)

11. In fact and in law, Claimant should not have included said sum of \$18,356.36 as income to her in her income tax return for the calendar year 1944, because it was not income to claimant but was distributed to her as a distribution of corpus out of the corpus of said trust.

12. The claimant should have reported as adjusted gross income the sum of \$26,730.63.

13. A recomputation of claimant's income tax for the calendar year 1944 shows the following:

1. Enter amount shown in Item 5, page 1. This is your Adjusted Gross Income.. \$26,730.63
2. Enter Deductions (if deductions are itemized above, enter the total of such deductions, if adjusted gross income (line 1 above) is \$5,000 or more and deductions are not itemized, enter the standard deduction of \$500)..... 2,096.39
3. Subtract line 2 from line 1. Enter the difference here. This is your Net Income 24,634.24
4. Enter your Surtax Exemptions (\$500 for each person listed on item 1, page 1) 1,000.00

5. Subtract line 4 from line 3.
Enter the difference here. This is
your Surtax Net Income 23,634.24
6. Use the Surtax Table in instruc-
tion sheet to figure your Surtax on
amount entered on line 5. Enter
the amount here 7,789.80
7. Copy the figure you entered on
line 3, above. (If the line 3 in-
cludes partially tax-exempt inter-
est, see Tax Computation instruc-
tions) 24,634.24
8. Enter your Normal-Tax Exemp-
tion (\$500 if return includes in-
come of only one person; otherwise
see Tax Computation Instructions) 500.00
9. Subtract line 8 from line 7, and
enter difference here 24,134.24
10. Enter here 3 per cent of line 9.
This is your Normal Tax 724.02
11. Add the figures on lines 6 and 10,
and enter the total here. (If al-
ternative tax computation is made
on separate Schedule D enter here
tax from line 15 to Schedule D) .. 8,513.82
12. Enter here any income tax pay-
ments to a foreign country or
U. S. possession (attach Form
1116)

13. Enter here any income tax paid at source on tax free covenant bond interest

14. Add the figures on lines 12 and 13 and enter the total here

15. Subtract line 14 from line 11. Enter the difference here and in item 6, page 1. This is your tax .. \$ 8,513.82

14. Claimant erroneously and in good faith paid as income taxes for the year 1944 the sum of \$23,024.09, as follows:

April 12, 1944.....	\$ 5,364.98
June 1, 1944.....	5,364.98
September 13, 1944.....	5,364.98
January 13, 1945.....	6,929.15
Total	<u>\$23,024.09</u>

15. The difference between the amount which claimant should have paid as an income tax for the calendar year 1944 and the amount she did pay as an income tax for said calendar year 1944 is the sum of \$14,510.27.

16. The above-mentioned overpayment of income tax was not required by the provisions of the Internal Revenue Code.

17. To interpret the provisions of the Internal Revenue Code as requiring claimant to pay an income tax on the said sum of \$18,356.36, which she received out of the corpus of the above-mentioned trust would be a violation of the Fifth and Six-

teenth Amendments to the Constitution of the United States, because——

(a) when the income from a trust is added to the corpus of the trust *ie* ceases thereafter to be income and becomes part of the corpus of the trust;

(b) distributions of the corpus of the trust to beneficiaries are not distributions of income to the beneficiary;

(c) distributions of the corpus of the trust to beneficiaries are received by the beneficiaries as legatees and devisees and not as income to the beneficiaries;

(d) no income tax may be imposed upon sums that are distributed out of the corpus of a trust;

(e) the clear intent of the trustor in the present trust was [17] to give to the beneficiary, claimant herein, portions of the trust corpus, as is clearly indicated by the paragraphs of the trust instrument quoted above;

(f) the intention of the trustor is controlling; and

(g) to consider distributions of corpus of a trust fund as distributions of income violates the sixteenth amendment and the fifth amendment to the Constitution of the United States.

18. Claimant has been informed that the above-mentioned overpayment of income tax was required by the Commissioner of Internal Revenue under the provisions of the Internal Revenue Code, section 162.

19. Claimant respectfully submits that the Internal Revenue Code, section 162, does not apply in any way to payments which are made to a beneficiary of a trust out of the corpus of that trust.

An analysis of the provisions of section 162 (d) Internal Revenue Code, clearly indicates that Congress was legislating in relation to the distribution of income. It was not legislating in relation to the distribution of corpus.

Claimant respectfully calls the attention of the Commissioner of Internal Revenue and of the Collector to the following authorities:

Mertens v. Rogan,

56 Fed. Supp. 450 at 451;

D.C.S.D., California, April 20, 1944;

Helvering v. Pardee,

290 U. S. 365;

Burnett v. Whitehouse,

283 U. S. 148;

Senate Finance Committee Report No. 1631;

77th Congress, Second Session, pages 59-60;

Frank H. Mason Trust v. Commissioner,

136 Fed. (2d) 335, 338; (C.C.A. 6th; 1943);

Cf. Mertens 1945 Pocket Supplement,

sections 36.21, 36.80.

The provisions of section 162, Internal Revenue Code, must [18] be interpreted so as to conserve the constitutionality of that section and, if possible, to

avoid the raising of the question of the constitutionality.

Crowell v. Benson,

285 U. S. 22, 62;

Ashwander v. Tenn. Valley Authority,

297 U. S. 288, 348 *semble*.

The law of California determines the validity and the meaning of the trust that is involved in this case.

Uterhart v. United States,

240 U. S. 598;

Blair v. Commissioner,

300 U. S. 5, 10.

Freuler v. Helvering,

291 U. S. 35, 44;

Mercantile Trust Co. v. Hofferbert,

58 Fed. Supp., 701, 703;

Estate of Gorham,

38 B.T.A. 1450, 1454.

Knowlton v. Moore,

178 U. S. 41;

Malgrem v. McColgan,

20 Cal. (2d) 424, 427.

The trust in the instant case was created in California and thus the law of the State of California controls the meaning, the validity, and the intention of the trust indenture and also determines the character and the validity of the interests which the beneficiary takes.

Under the law of California a valid trust "may be created for any purpose for which a contract may

be made," (Cal. Civil Code, Section 2220; *Hellman v. McWilliams*, 70 Cal. 449; *Estate of Reith*, 144 Cal. 314; *Reiss v. Reiss*, 45 C. A. (2d) 740, 746; hearing by Supreme Court denied); and a contract for the benefit of a third party is a valid contract (Cal. Civil Code, Section 1559; *Washer v. Independent M. & D. Co.*, 142 Cal. 702, 708; *Sherwood & Sherwood v. Gill and Lutz*, 36 C. A. 707; *Pacific Ventura Corp. v. Huey*, 15 Cal. (2d) 711, 718). Hence, a trust agreement under which the Trustor conveys property to the Trustee who promises to give that property, in installments, to the beneficiary under the trust is in effect and actuality a contract for the benefit of a [19] third party and is a valid trust agreement (Cal. Civil Code, Section 2220).

The beneficiary under a trust, which has been created by the law of the State of California, has no property interest in either the corpus of or the income from the trust (Cal. C. C., section 863). The beneficiary has only a personal action against the trustee to enforce the performance of the trust (California Civil Code, Section 863; *Estate of Fair*, 132 Cal. 523; *Estate of Troy*, 214 Cal. 53, 56; *Anglo-California Bank v. Kidd*, 58 C. A. (2d) 651, 654 (1943). Hence, whatever income arises out of the trust, or accrues to the corpus of the trust, does not belong to the beneficiary as income because the trust and the beneficiary are separate and distinct persons for tax purposes. They are separate taxpayers (*Anderson v. Wilson*, 289 U. S. 20, 27; *Ardeghi v. Helvering*, 100 F. (2d) 406, 407, C. C. A. 2, 1938;

141 A.L.R. 1117, 1119, cites a long list of cases which accept and follow *Anderson v. Wilson*, *supra*.)

Furthermore, Section 163 of the Probate Code of California says:

“An annuity is a bequest of certain specified sums periodically . . .”,

and the Courts of California have kept the difference between an “annuitant” and an “income beneficiary” clear, sharp and distinct, (*Marre’s Estate*, 18 Cal. (2d) 184, 188 (1940); *Dasher’s Estate*, 53 C. A. (2d) 721, 724, 1942 *semble*; hearing by Supreme Court denied; *Mackay’s Estate*, 107 Cal. 303, 308; *Fraser v. Carman-Ryles*, 8 Cal. (2d) 143, 145; *Watson’s Estate*, 32 C. A. (2d) 594, 599; *Amphlett’s Estate*, 39 C. A. (2d) 551, 554; *Clayes v. Nutter*, 49 C. A. 142, 149; *Brown’s Estate*, 142 Cal. 450, 453, 455; *Estate of Roberts*, 27 A. C. 71, 78, and cases cited 1945; Cal. Probate Code, Sections 163, 163 (3).)

The leading cases are as follows:

Coleman Trust Co. et al., v. Commissioner,
3 T. C. 943 (1944); [20]

Helvering v. Butterworth,
290 U. S. 365;

Irvin v. Gavit,
268 U. S. 161 (1924);

Malgrem v. McColgan,
20 Cal. (2d) 424;

Belle Frankel,
3 T. C. 231; affirmed in

Frankel v. Commissioner,
144 Fed. (2d) 1023; C. A. A. 8;

Schenectady Trust Co., B. T. A. Memo.

Op. Dkt. 107,988, Sept. 9, 1942;

Northern Trust Co. v. Commissioner,

T. C. 1945, Docket No. 1647, 1760, P-h 1945
par 74,176, (Acquiescence, P-H, 145,
72,247);

Burnet v. Whitehouse,

283 U. S. 148;

Helvering v. Pardee,

290 U. S. 365;

Frank H. Mason Trust v. Commissioner,

136 Fed. (2d) 335; C. C. A. 6, 1943;

Union Trust Co. of Pittsburg v. Commis-
sioner,

115 Fed. (2d) 86, C. C. A. 3;

Union Trust Co. of Indianapolis,

111 Fed. (2d) 60, C. C. A. 7;

Brushaber v. Union Pacific Railroad,

240 U. S. 1, 24 (1916);

Heiner v. Donan,

285 U. S. 312, 326 (1923);

Nichols v. Coolidge,

274 U. S. 531 (Revenue Act of 1919);

Untermeyer v. Anderson,

276 U. S. 440 (Revenue Act of 1924);

Heiner v. Donnan,

supra; (Revenue Act of 1926);

Handy & Delaware Trust Co. v. Edwards,

285 U. S. 352;

Cf. Blodgett v. Holden,

275 U. S. 142; and

Barelay & Co. v. Edwards,

267 U. S. 442, 450.

These cases establish the following basic propositions of law: [21]

First: The income, from an estate or trust, which remains unchanged in character from the time that it is received by the Trustee until the time when it is distributed by the Trustee to the legatee or beneficiary, is received by the legatee or beneficiary as income to the legatee or beneficiary, at the time when the distribution is made to the legatee or beneficiary;

Second: Where the Trustor gives income to the beneficiary and intends that the income should be augmented by additions from the corpus of the trust, then the act of the Trustee, in adding the corpus to the income, changes the character of that which was corpus so that the former corpus is changed into income before the distribution is made to the beneficiary; and that all which the beneficiary receives is income from the trust at the time that the beneficiary receives it;

Third: If the Trustor intends that the beneficiary should receive an annuity which is to be a fixed charge upon the corpus of the trust, then that which the beneficiary receives is not income to him, even though the beneficiary receives other sums out of income in addition to the sums which he receives as an annuity out of the corpus.

Claimant respectfully submits that the application of the existing, established law to the facts in the present case must result in a holding and deter-

mination that the payments made by the Trustees to the claimant were payments which were made out of the corpus of the trust and not out of the income from the corpus of the trust and that, as to her, said payments were not income; and that in good faith she has made an overpayment of an income tax in the sum of \$14,510.27, which lawfully should be refunded to her, with interest on such payments from date of payment, as shown in [22] paragraph 14 hereof.

Certificate

I hereby certify that the claim for refund to which this certificate is attached was prepared by me on behalf of the claimant and that the facts stated therein are true and correct to the best of my knowledge and belief.

Dated at Los Angeles, California, this 4th day of May, 1946.

/s/ RALPH W. SMITH,
919 Oviatt Building, 617 South Olive Street, Los
Angeles 14, California. [23]

Exhibit A

Last Will And Testament of
John B. Bryan

In The Name of God, Amen:

I, John B. Bryan, a resident of and domiciled in the County of Los Angeles, State of California, being of lawful age and of sound and disposing mind and memory and not acting under duress, menace, fraud or undue influence of any person whomsoever, do make, publish and declare this my Last Will and Testament and do hereby expressly revoke any and all former Wills and Codicils to such Wills and/or testamentary dispositions heretofore by me at any time made.

Article I.

Payment of Debts: I hereby direct that all my just debts, last illness and funeral expenses be paid as soon as practicable after my death.

Article II.

Natural Heirs and Specific Bequests: I declare that I am a widower and that I have living only one child, to wit, my beloved daughter, Margaret Bryan Smith, of Pasadena, California. To her I give, devise and bequeath all or so much of the following property owned by me at the time of my death:

(a) My home place, situate at 2210 Orlando Road, San Marino, California, and all furniture and furnishings of every kind and nature in

said home, and each and everything appurtenant thereto, including all automobiles.

(b) All the following described property and appurtenances thereto situate, lying and being in the City of Oakland, County of Alameda, State of California, to wit: Lot No. 23, in Block No. 2111, as said lot and block are delineated and so designated upon that certain map entitled "Map of the Alden Tract at Temescal," filed December 10, 1869, in the office of the County Recorder, Alameda County.

John B. Bryan

Page One.

Items (a) and (b) of this paragraph are more fully described and set forth in the petition terminating the joint tenancy, filed by me in the Superior Court of the State of California, in and for the County of Los Angeles.

(c) My former home and property situate at 2 Seneca Parkway, Rochester, New York, and all furniture and furnishings of every kind and nature in said home, and each and everything appurtenant thereto, including my automobile there.

(d) My personal effects, including jewelry, clothing, etc.

All the foregoing to be the property and estate of my daughter forever, providing she survives me. In the event of her predeceasing me I then give, devise and bequeath the property in this "Article II" described to my Trustees hereinafter named, to

be by them held in trust, as a part of the corpus of the trust estate herein created.

Article III.

Residue In Trust: I give, devise and bequeath all the rest, residue, and remainder of my properties and estate, whether real, personal or mixed, of whatsoever kind and character and wheresoever situate, which I hereby term the "Trust Estate," to Margaret Bryan Smith, and First Trust and Savings Bank of Pasadena, a corporation, as Trustees, and the survivor and/or successor of her or it, to be held in trust for the uses and purposes hereinafter set forth.

The said Trustees shall enjoy, have and possess and they are hereby vested with full, absolute and exclusive dominion and discretion over said trust property or any property forming a part of the corpus of said trust, except as hereinafter, in "Article V," limited and restricted, with full power to collect and receive all dividends, profits, interest, rents and other income of whatsoever nature accruing thereon or receivable

John B. Bryan

Page Two.

therefrom, and are hereby authorized to invest, as herein limited and restricted, and reinvest and keep invested the whole or any part of the principal of said trust, as Trustees hereof.

Article IV.

Powers of Trustees: My Trustees, to carry out the express purposes of this trust, and in aid of its execution and the proper administration, management and disposition of the trust estate, subject only to the limitations and restrictions hereof, are specifically vested and clothed with the following powers, in addition to any other powers herein conferred:

(a) To possess, manage, control, grant, warrant, bargain, sell, convey, exchange, convert, encumber, mortgage, hypothecate, trade, loan, lease for a term or terms either within or beyond the duration of this trust, pledge, assign as collateral for a loan or otherwise, partition, divide, subdivide, syndicate, improve, loan, re-loan, invest and reinvest the said trust properties or any part thereof or any interest therein, at such time or times and in such manner, either public or private, and upon such terms as to them may seem in their absolute and uncontrolled judgment to be for the best interest of said trust, and may substitute other property for any portion thereof sold or otherwise disposed of, and invest the said trust properties in whatever form it may take in such securities and property as shall the best judgment of the said Trustees dictate.

(b) To execute and deliver proxies, options, powers of attorney, bills of sale, leases, deeds, agreements, satisfactions of liens, encumbrances, or mortgages and other instruments in

writing and any and all conveyances, by deed or otherwise, that the said Trustees may deem necessary or advisable in administering said trust and performing their duties and offices hereunder. Purchasers and other persons who shall pay any trust monies to said Trustees shall be exempt from all responsibility with respect to the application of the same and from the necessity in inquiring into the regularity, validity or

John B. Bryan

Page Three.

propriety of any disposition made or purported to be made under the trust or powers contained in this instrument, provided the same upon its face does not appear to be irregular.

(c) To own, buy, sell, or hold real estate or personal property, whether tangible or intangible, anywhere without limit; to acquire and own stock in or entire charters of corporations; to borrow money for the trust, using and pledging the trust property for payment, and to engage the trust funds and properties in any kind of enterprise or investment which their judgment dictates for intended gain to the trust or otherwise. To grant options and sell properties of the trust at public auction, at a broker's board or at private sale for cash or upon credit and upon terms and conditions determined by them. To improve any real property subject to this trust, repair, alter, build or extend any

improvements thereon of such character, kind, amount, cost, and from such funds or property subject to this trust as they may deem advisable. To grant, make, renew or take leases of property even though the lease or renewal extends beyond the trust term, whether the rights and privileges are on, above or below the surface of real property, for any purpose, on a cash, deferred or installment payment, royalty, optional or other basis.

(d) To receive, invest and hold all real and personal property, stocks, bonds, or chattels at any time belonging to the trust estate in their name as Trustees, or said Trustees may hold all or any of said trust property in the name of any person they may elect, or in the name of a nominee or agent or in a street name, and shall not be responsible for any loss or liability for so doing. To vote, manage, sell and reinvest said trust property and every part thereof, either original or subsequent, or at any time held by them in such loans, securities and property, whether real or personal, as to the said Trustees may seem wise and expedient. All statutory requirements and other restrictions touching the investment of trust funds now or hereafter prescribed by law shall not be prohibitions, conditions or limitations upon the actions of the said Trustees. In this regard the Trustees in the management and investment of the trust may do any lawful thing which other citizens may do in any State or Country

in relation to the management and investment of property.

(e) To consent to the consolidation, merger, reorganization or other corporate change of any corporation whose securities form a part of this trust, or to the organization of a corporation and the exchange of any part of the trust

John B. Bryan

Page Four. [25]

properties for stock of any corporation. To consent or agree to the dissolution of any corporation of which the trust may at any time be a stockholder. To represent the trust in all suits or legal proceedings in any Court of law or equity or before any other body or tribunal; to employ counsel, to commence suits or proceedings, or to defend the same, and to release, compound, compromise, or submit to arbitration any and all claims and/or demands and all matters of dispute to which the trust or Trustees may be a party, or in which any trust property or any activity of any Trustee as such may be involved, whenever and in such manner as such Trustees in their judgment may deem proper and in the name of the trust or in the name of the Trustees.

(f) To employ, hire, engage, retain and contract for managers, agents, servants, help and employees and to discharge same.

The foregoing specifications of power and authority so granted to the Trustees shall not be deemed to be restrictions upon the general powers and discretions implied or given to the Trustees, nor limitations thereof, but the Trustees shall, in respect to all trust properties, whether tangible or intangible, held by them have unrestricted powers in respect thereto, subject to the limitations and restrictions specifically herein imposed upon the said Trustees in relation to the investment, reinvestment, administration and/or management of the trust estate.

Article V.

Restrictions and Limitations Upon Trustees: I hereby vest in my said Trustees all powers and authority expressly herein granted, and in addition thereto all powers and authority which a natural person may possess or exercise in relation to property, with the following limitation and restriction, that is to say, that no sale or other change (other than by operation of an instrument or by law) shall be made by the Trustees or the survivor of them, in the corpus of said trust and no investment or reinvestment of any part of the corpus of said

John B. Bryan

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including all withheld or accumulated income, shall at any time be made by the said Trustees without first having secured the written consent of a majority of the following named persons and the survivors of them and/or their successors in office:

Mrs. Margaret Bryan Smith, of Pasadena, California; George M. Wood, Esq., Theodore C. Briggs, Esq., Ezra Hale, Esq., and Arthur J. Gosnell, Esq., all of Rochester, New York; and Fred D. Moss, Esq., of Bancroft-Whitney Company, San Francisco, California.

The foregoing persons just named I designate as an Investment and Advisory Committee. I direct that said Committee be never less than three (3) persons and at such time or times when only two (2) persons compose said Committee that these two appoint another person as a member thereof; the Trustees to be immediately advised in writing of the name and address of the person or persons selected.

The registry of a letter properly addressed, with postage prepaid, to the last known address by the Trustees to any one or more of said persons composing the said Investment and Advisory Committee, requesting that said person act in writing in relation to the power or authority vested herein in such person relative to the subject matter of said trust, and the failure of the Trustees to receive a reply to said letter within a period of fourteen (14) days after posting same, shall be considered as an affirmative act and vote on the part of the addressee of said letter, and direction to the Trustees to act affirmatively in regard to the matter in said letter contained.

Article VI.

Suggestions to Trustees and Investment and Advisory Committee: Fully appreciating the uncertainties of the future

John B. Bryan

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and anticipating the difficulties in advising the type of investment in which the corpus, or any part thereof, of this said trust should flow, without attempting to place any additional limitations upon the investments and reinvestment of any part of the corpus, I suggest that no part of the corpus be invested or reinvested in purely Land, Building, Theatre or Irrigation stock or [26] bonds, or in the acquisition of Syndicate Interests, but that securities or obligations or unconditionally guaranteed obligations of the Government of the United States of America or of a Sovereign State be selected in preference to Obligations of Political Subdivisions of a Sovereign State. In the selection of common stocks, preferred stocks or bonds, it may be wisdom to select nationally known companies with AA rating or better, whose financial condition is satisfactory, and whose interest requirements were fully met for a long period of years immediately preceding the time of the investment.

No restriction is placed upon my Trustees in retaining in the trust any property that they might receive through distribution of my estate.

At the present time I am the President and Chairman of the Executive Committee of Bancroft-Whit-

ney Company, of San Francisco, California, and have been for many years directly interested in this company, and in the Lawyers-Cooperative Publishing Company of Rochester, New York. I possess unbounded faith in the integrity and competency of the officers of these companies and I am of the opinion that the stock which I own in these companies is and shall continue to be an excellent investment as a part of the corpus of the trust herein created. It is my hope, therefore, that profound consideration be given to the history, substance, merit, and prospective worth of these com-

John B. Bryan

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panies before any of my holdings therein be disposed of.

Article VII.

Definition of Net Income: From the gross income received and derived from the trust properties and/or from the principal thereof, if the Trustees deem that necessary, said Trustees shall first fully pay and discharge any and all taxes, assessments (both general and special), including governmental charges and costs, attorneys' fees, expenses and liabilities incurred by them as such Trustees, or to which they may be entitled or which they may incur in connection with the care, administration, management, protection, preservation or distribution of said trust property, including a reasonable compensation to said Trustees for their services as Trustees hereunder. The remaining income shall be net in-

come, withheld, accumulated or payable as follows:

(a) The net income received and derived from the trust estate shall be by my said Trustees, during the natural life of my daughter, Margaret Bryan Smith, retained by them and as and when received immediately added to the principal or corpus of the said trust and thereafter such income and profits shall be considered as principal of said trust.

(b) My said Trustees, beginning from the date of the distribution of my estate to them as Trustees, shall pay each year in convenient installments, monthly if possible, to my said daughter, Margaret Bryan Smith, during the term of her natural life, five per cent (5%) of the fair market value of the corpus of said trust. In determining the fair market value of the corpus of said trust and the percentage thereof herein directed to be paid to my said daughter, the said Trustees yearly on the anniversary date of my death shall cause to have the then trust corpus appraised by a banking institution

John B. Bryan

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or trust company in the County of Los Angeles, and for the year immediately following shall accept this said appraisal and pay to my said daughter five per cent (5%) thereof for each respective annual period. Upon the unanimous consent of the Trustees the Corporate Trustee may act as the appraiser.

(c) From and after the death of my said daughter it is then my wish and I direct that the

surviving Trustee pay and distribute the entire net income from said trust estate in equal parts, share and share alike, to the then living children of my said daughter and the issue of any one of them who may have deceased, per stirpes, and to the lineal descendants of any deceased issue of theirs by right of representation, so long as the last one of the children of my said daughter, to wit, Grace Patricia Smith and Margaret Joan Smith, now living shall live.

(d) In the event that any one or more of the children now born or hereafter to be born to the said Margaret Bryan Smith should decease without issue or lineal descendants or issue her or him surviving or should leave issue and the said issue become extinct, the share [27] of the net income of the surviving child or children of the said Margaret Bryan Smith and the issue of any deceased child and lineal descendants of any deceased issue, per stirpes, shall be equally augmented thereby.

(e) Upon the death of the last living one, to wit, the last survivor of my daughter, Margaret Bryan Smith, and her now living children, Grace Patricia Smith and Margaret Joan Smith, it is then my wish and I direct that this trust must cease and terminate and my then Trustee forthwith transfer,

John B. Bryan

Page Nine.

grant, assign, and deliver, in equal parts and shares, the then corpus and all undistributed income of said trust estate to the then living issue, per stirpes,

of my daughter, Margaret Bryan Smith, and lineal descendants of any deceased issue of my said daughter, the lineal descendants taking by right of representation, thus winding up and forever terminating this trust. Should, at the time of the termination of this trust, no issue of my said daughter or lineal descendants of any deceased issue be then living, I then direct that the corpus of said trust, together with all accumulated income, be distributed to the then living blood heirs of Margaret Bryan Smith, to be determined by the laws of succession of the State of California now in force and effect.

Article VIII.

Any beneficiary of this trust, subject to the limitations hereof, shall have the right to purchase any of the trust property and otherwise to deal with the Trustees as freely as strangers to the trust, even though said beneficiary may also be a trustee hereof; and any beneficiary under this my Will and under the trust herein created shall not by reason thereof at any time be precluded from also being a trustee.

Article IX.

The term "Trustee" shall include the Original Trustees herein named, to wit, Margaret Bryan Smith, and the First Trust and Savings Bank of Pacadena, a corporation, and the survivor of them, and the Succeeding and/or Appointed Trustee herein nominated and/or selected, as follows:

It is my wish that one of the Trustees hereof at all times be a Corporate Trustee. Upon the death,

resignation, or disqualification of Margaret Bryan Smith, if at that time her oldest living child and issue of any deceased child has

John B. Bryan

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attained the age of twenty-one (21) years, I designate and appoint such oldest one of her children and the issue thereof as First Succeeding Trustee in the place and stead of my beloved daughter, Margaret Bryan Smith. If, upon the happening of that event the oldest living one of her children and issue of any deceased one of them has not attained the age of twenty-one (21) years, then I direct that my Investment and Advisory Committee nominate and appoint some person, not a corporation, to act as a Co-Trustee with the Corporate Trustee until the oldest child and issue of any deceased child of my said daughter attains the age of twenty-one (21) years, at which time such child or issue of any deceased child shall automatically replace the Trustee selected by my said Investment and Advisory Committee.

I direct at all times when possible one of the beneficiaries hereof also be a Trustee of the trust herein created and to this end I desire that at all times following the death, resignation or disqualification of my daughter, Margaret Bryan Smith, as a Trustee hereof, her oldest child and issue of any deceased child succeed in turn as the individual Trustee of the trust herein created.

Article X.

Restriction Upon the Power of Alienation: Each and every beneficiary under this my Will is hereby restrained from, and is and shall be without right, power and authority to sell, transfer, pledge, mortgage, hypothecate, encumber, alienate, anticipate, or in any other manner assign, affect or impair his or her beneficial and/or legal right, title, interest, claim and estate in and to the income and/or principal of the trust created and/or benefits conferred under this my Will, nor shall

John B. Bryan

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the right, title, interest and estate of any beneficiary hereunder be subject to the rights or claims of creditors of any beneficiary nor subject nor libel to attachment or judgment or any process of law or court, bankruptcy proceedings or otherwise, and all of the income and/or principal under [28] the trust or benefits conferred in this my Will shall be transferable and payable only, solely and exclusively to the designated beneficiary and/or beneficiaries hereunder at the times entitled to take the same under this my Will, and the personal receipts of the designated beneficiary and/or beneficiaries hereunder or their duly authorized attorney or agent shall be a condition precedent to the payment or delivery of the same by said Trustees to each of such beneficiary or beneficiaries.

Article XI.

The profits and losses, if any, arising from any activity of the Trustees as such shall respectively inure to the benefit of or be chargeable against the trust and not the Trustees.

Article XII.

In the event that any provision or clause of this my Will shall be declared void, such fact shall not affect any other provision or clause herein and my said Will shall be read and interpreted as if such provision or clause so declared void had never been inserted herein.

Article XIII.

If the benefits to which any person may be entitled under the trust created herein shall, in the discretion of the Trustees, be insufficient to provide such person with suitable

John B. Bryan

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support, maintenance, comfort, education and reasonable expenses in case of illness, want, or other necessity, then said Trustees may pay to, apply or extend for the use and benefit of such person so much of the principal as the Trustees may deem advisable, but not to exceed such part of the principal as is proportionate to the share of income and corpus such person is at the time entitled to receive hereunder.

It is my desire that this be a trust for maintenance and I therefore direct that my Executors pay the income from my estate to my daughter and in

the event of her predecease, then to her children, beginning from the date of my demise and continuing until distribution of the trust estate to the Trustees.

Article XIV.

I direct that every gift, devise, bequest and interest given under this my will or any Codicil hereto shall be delivered free from all estate, succession and inheritance taxes and that such taxes be paid out of the residue of my estate.

Article XV.

In the event of the sale or transfer by the Corporate Trustee as a whole or substantially as a whole of its business or assets or of its liquidation or its being converted, merged, or consolidated with any other company, association or banking institution, the powers and privileges herein granted shall immediately cease and its successor, transferor or substitute shall have no right, title, interest or privilege as a Trustee hereunder; and I hereby vest in the oldest then living income beneficiary of the trust the power and authority to nominate and appoint another Corporate Trustee instead of the First Trust and Savings Bank of Pasadena, a corporation.

John B. Bryan

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Article XVI.

I direct that the Trustees hereunder shall annually prepare and file in the Superior Court, or such other court in which the probate of my estate is filed, in the County of Los Angeles, State of

California, a correct accounting and detailed report and statement of the transactions in relation to the trust property, and apply for confirmation thereof. Such report shall be similar to the proceedings now required by law of a guardian for a minor. The report shall specifically disclose the corpus of the trust, the annual disbursements and the gross and net income therefrom. After the death of my daughter a copy of this annual report or account, prior to the filing thereof, shall be personally delivered to or by registry mailed to each of the then living persons named in "Article V" hereof.

Article XVII.

I appoint as Executrix and Executor hereof my daughter, Margaret Bryan Smith, and the First Trust and Savings Bank of Pasadena, a corporation, and the survivor of them. I direct that my Executrix and Executor as well as my Trustees act without bond and that no undertaking at any time be required of either of them. [29]

In Witness Whereof, I have hereunto set my hand and seal this 29th day of May, 1937, at Los Angeles, California.

JOHN B. BRYAN.

The foregoing instrument, consisting of fourteen (14) pages, including this page, was on this 29th day of May, 1937, subscribed by John B. Bryan, the testator named therein, upon this and each of the preceding pages, and declared by him

Page Fourteen.

to be his Last Will and Testament in the presence of the undersigned persons, who have subscribed their names as witnesses to the execution of said Will at the request of said John B. Bryan, said Testator, and in his presence and in the presence of each other.

MARGUERITE Le SAGE

residing at 1207 Miramar,
Los Angeles, Calif.

J. EVERETT BLUM,

residing at 1823 Milan Ave.,
South Pasadena, Calif.

JOHN M. ROBINSON,

residing at 140 So. Roxbury
Dr.,
Beverly Hills, Calif.

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(Endorsed) No. 179740
Last Will and Testament
of

John B. Bryan

Dated, May , 1937

Filed Sep 21 1938

L. E. Lampton, County Clerk

By L. L. Smith, Deputy

Admitted to Probate Oct 13 1938

Attest: L. E. Lampton, County Clerk

By G. W. McDonald, Deputy

Codicil to Last Will and Testament.

I, John B. Bryan, of Los Angeles County, California, being of sound and disposing mind and memory, not acting under duress, menace, fraud or undue influence of any person whomsoever, do publish and declare this to be a Codicil to my Last Will and Testament executed on or about the 29th day of May, 1937:

First: I revoke the appointment of the First Trust and Savings Bank of Pasadena as co-executor of my Will and co-trustee of the trust created therein, and in its place and stead, I appoint the Security-First National Bank of Los Angeles, a national banking association, to be co-executor under my Will with my daughter Margaret Bryan Smith, and also to be co-trustee with her of the trust created in said Will; and I invest the said Security-First National Bank of Los Angeles with the same rights, powers and responsibilities, as co-executor with my daughter Margaret, and the same rights, powers and responsibilities as co-trustee, as those I have bestowed upon the First Trust and Savings Bank of Pasadena, in my Will.

I direct that the executor fees in my estate be divided equally between my co-executors, and I further direct that the compensation of the corporate co-trustee under the trust created in my Will, shall be as follows:

(a) An annual compensation for its ordinary or usual duties as co-trustee, a sum equal to one-half of one per cent ($\frac{1}{2}$ of 1%) of the value of the trust estate.

(b) A reasonable compensation for any unusual or extraordinary services rendered by it as co-trustee.

(c) At the time of the termination of said trust, a sum equal to one per cent (1%) of the then value of the principal of the trust estate, for the final distribution, closing and settlement of the trust.

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Second: Grace Patricia Smith is the natural daughter of my daughter Margaret, and Margaret Joan Smith is the adopted daughter of my said daughter Margaret.

In the construing of my Will, I direct that Margaret Joan Smith be considered and deemed to be the issue of the body of my daughter Margaret, and Margaret Joan Smith's issue, if any, be deemed and considered the issue of my daughter Margaret, the same as the issue of her daughter Grace Patricia Smith.

In Witness Whereof, I have hereunto set my hand this 17th day of June, 1938.

JOHN B. BRYAN.

The Foregoing Instrument, consisting of two pages, including the page signed by the witnesses, was at the date hereof by the said John B. Bryan signed, sealed, published and declared to be a Codicil to his Last Will and Testament, in the presence of us, who, at [31] his request and in his presence,

and in the presence of each other, have signed the same as witnesses thereto.

MARY V. ROOCH,

Residing at 774 So. Oakland
Ave.,
Pasadena, California.

DAVID D. STUART,

Residing at 260 So. Lorraine,
Los Angeles, Calif.

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(Endorsed) No. 179740

Codicil to
Last Will and Testament of
John B. Bryan

Dated: June 17th, 1938

Filed Superior Court
1938 Sep 21 PM 1 54

L. E. Lampton
L. A. County Clerk
L. L. Smith, Deputy

Admitted To Probate
Oct 13 1938

Attest: L. E. Lampton, County Clerk
By G. W. McDonald, Deputy

Exhibit C

Form 1040

U. S. Individual Income Tax Return
For Calendar Year 1944

1944

Name : Margaret Bryan Smith

Address : 710 South Orange Grove Avenue
Pasadena 2, California

Your Exemptions

1. List your own name. If married and your wife (or husband) had no income, or if this is a joint return of husband and wife, list name of your wife (or husband). List names of other close relatives with 1944 incomes of less than \$500 who received more than one-half of their support from you. If this is a joint return of husband and wife, list dependent relatives of both.
Your name : Margaret Bryan Smith.
Margaret Smith, Daughter.

Your Income

2. Enter your total wages, salaries, bonuses, commissions, and other compensation received in 1944, Before Pay-Roll Deductions for taxes, dues, insurance, bonds, etc. Members of armed forces and persons claiming traveling or reimbursed expenses, see Instruct'n 2.
Employer's Name : Security-First National Bank, executrix fees.
Where Employed : Los Angeles, California.....\$595.84
\$ 595.84
3. Enter here the total amount of your dividends and interest (including interest from Government obligations unless wholly exempt from taxation)..... 21,975.44
4. If you received any other income, give details on page 3 and enter the total here..... 22,515.71
5. Add amounts in items 2, 3, and 4, and enter total here.....\$45,086.99
- Tax Due or Refund
6. Enter your tax from table on page 2, or from line 15, page 4\$22,388.23
7. How much have you paid on your 1944 income tax ?
(A) By withholding from your wages.
(B) By payments on 1944 Declaration of
Estimated Tax\$23,024.09
\$23,024.09

8. If your tax (item 6) is larger than payments (item 7), enter Balance of Tax Due here.
9. If your payments (item 7) are larger than your tax (item 6), enter the Overpayment here.....\$ 635.86
- If you filed a return for a prior year, what was the latest year? 1943
To which Collector's office was it sent? 6th, California
To which Collector's office did you pay amount claimed in item 7 (B), above? 6th, California

I declare under the penalties of perjury that this return (including any accompanying schedules and statements) has been examined by me and to the best of my knowledge and belief is a true, correct, and complete return.

Dated 3/8/45.

MARGARET BRYAN SMITH,
(Signature of Taxpayer)

Prepared without audit from data submitted by taxpayer,
Howell & Pedersen.

Schedule A.—[No data shown]

Schedule B.—Income From Rents and Royalties

1. Kind of property: Warehouse.
 2. Amount of rent or royalty \$4,800.00.
 3. Depreciation or depletion (explain in Schedule F) \$1,092.00
 4. Repairs (explain in Schedule G)
 5. Other expenses (itemize in Schedule G) \$1,034.62
- Net profit (or loss) (col. 2 less sum of cols. 3, 4, and 5).....\$2,673.38

Schedule C.—[No data shown]

Schedule D.—Gains and Losses From Sales or Exchanges
of Capital Assets, Etc.

1. Net gain (or loss) from sale or exchange of capital assets
(from separate Schedule D).....\$1,385.00

Schedule E.—Income From Partnerships, Estates and
Trusts, and Other Sources

Name and address of estate or trust Security-First
National BankAmount, \$18,356.36
Other sources: Trust.....Amount, 100.97
Total.....\$18,457.33

Total income from above sources (Enter as item 4, page 1)....\$22,515.71

Schedule F.—Explanation of Deduction for Depreciation
Claimed in Schedules B and C

1. Kind of property: Warehouse
 2. Date acquired 8/18/38 3. Cost or other basis \$36,400.00
- [Items 4, 5, 6—no data shown]
7. Estimated life used in accumulating depreciation 33 $\frac{1}{3}$
- [Item 8—no data shown]
9. Depreciation allowable this year \$1,092.00.

Schedule G.—Explanation of Columns 4 and 5 of Schedule B,
and Lines 6, 14, and 17 of Schedule C

1. Column or Line No.	2. Explanation	3. Amount
5	Taxes	\$919.62
	Stationery	60.00
	Telephone and Telegrams	55.00

Deductions

Contributions

Church	\$200.00
Salvation Army	25.00
War Chest	125.00
Children's Home	25.00
Red Cross \$100.00 Christmas Seals \$10.00	110.00

Allowable Contributions (not in excess of 15 per cent
of item 5, page 1).....\$ 485.00

Taxes

Pasadena city & Los Angeles County.....	\$477.23
Orange County	128.68
Newport Beach	167.87
Automobiles	21.50
California income \$573.50 State sales \$142.62.....	716.12

Total Taxes 1,511.39

Miscellaneous

Accounting service\$100.00

Total Miscellaneous Deductions 100.00

Total Deductions\$2,096.39

Tax Computation—For Persons Not Using Tax Table on Page 2

1. Enter amount shown in item 5, page 1. This is your
Adjusted Gross Income\$45,086.99
2. Enter Deductions (if deductions are itemized above, enter the total of such deductions; if adjusted gross income (line 1, above) is \$5,000 or more and deductions are not itemized, enter the standard deduction of \$500)..... 2,096.39
3. Subtract line 2 from line 1. Enter the difference here.
This is your Net Income.....\$42,990.60
4. Enter your Surtax Exemptions (\$500 for each person listed in item 1, page 1)..... 1,000.00
5. Subtract line 4 from line 3. Enter the difference here.
This is your Surtax Net Income.....\$41,990.60
6. Use the Surtax Table in instruction sheet to figure your Surtax on amount entered on line 5. Enter amount here..\$21,113.51
7. Copy the figure you entered on line 3, above. (If line 3 includes partially tax-exempt interest, see Tax Computation Instructions)\$42,990.60
8. Enter your Normal-Tax Exemption (\$500 if return includes income of only one person; otherwise see Tax Computation Instructions) 500.00
9. Subtract line 8 from line 7, and enter difference here.....\$42,490.60

10. Enter here 3 per cent of line 9. This is your
Normal Tax\$ 1,274.72
11. Add the figures on lines 6 and 10, and enter the total
here. (If alternative tax computation is made on
separate Schedule D, enter here tax from line 15
of Schedule D)\$22,388.23

[Items 12, 13 and 14—no data shown]

15. Subtract line 14 from line 11. Enter the difference here
and in item 6, page 1. This is your tax.....\$22,388.23

Schedule D (Form 1040)

U. S. Treasury Department

Schedule of Gains and Losses From Sales or Exchanges of

(1) Capital Assets and (2) Property Other Than Capital Assets

(To Be Filed With the Collector of Internal Revenue With Form 1040)

For Calendar Year 1944

Or fiscal year beginning 1944 and ending 1945

Name of taxpayer Margaret Bryan Smith

Address 710 South Orange Grove Avenue, Pasadena 2, California

(1) Capital Assets

Long-Term Capital Gains and Losses—Assets Held for
More Than 6 Months

Distributions:

Mass. Inv. Trust	\$ 70.00	50%	\$ 35.00
State St. Inv. Corp.	2,700.00	50%	1,350.00

Total net long-term capital gain or loss (enter in line 2,
column 3, of summary below)\$1,385.00

Summary of Capital Gains and Losses

[Item 1—no data shown]

2. Total net long-term capital gain or loss....*\$1,385.00 **\$1,385.00

3. Net gain in column 5, lines 1 and 2. (Enter on line 1,

Schedule D, page 2, Form 1040).....\$1,385.00

[Item 4—no data shown]

* 3. Net gain to be taken into account from column 10, above.

** 5. Total net gain taken into account in columns 2, 3, and 4 of this
summary.

Computation of Alternative Tax—[no data shown]

(2) Property Other Than Capital Assets—[no data shown]

Exhibit No. 2
Treasury Department
Washington 25

Office of
Commissioner of Internal Revenue

Dec. 23, 1947.

Address Reply to
Commissioner of Internal Revenue
And Refer to
IT:CL:CC:Rej
Margaret Bryan Smith
710 South Orange Grove Avenue
Pasadena (2) California

In re: Claim for refund of \$14,510.27
For the year 1944

Dear Mrs. Smith:

In accordance with the provisions of section 3772(a)(2) of the Internal Revenue Code, this notice of disallowance in full of your claim or claims is hereby given by registered mail.

By direction of the Commissioner:

Very truly yours,

E. I. McLARNEY,
Deputy Commissioner.

[Endorsed]: Filed March 18, 1948. [63]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant in the above-entitled action and in answer to the plaintiff's complaint, admits, denies and alleges:

First Defense

I.

(a) Admits the allegations contained in paragraph I(a) of the complaint.

(b) Admits the allegations contained in paragraph I(b) of the complaint, except that it is denied that the tax paid by plaintiff, which plaintiff seeks to recover in this action, was an erroneous payment or an overpayment, and it is alleged that the income upon which the tax was imposed was not merely alleged income, but was true taxable income of plaintiff.

II.

Denies the allegations contained in paragraph II of the complaint except that it is admitted that John B. Bryan died September 8, 1938, a resident of California, leaving a will, and that the will was admitted to probate [64] by the Superior Court for Los Angeles County, California, and it is admitted that Exhibit 1 attached to the complaint is a true copy of the claim for refund except as to the Exhibits, and it is admitted that Margaret Bryan Smith, the plaintiff, is the daughter of John B. Bryan, deceased.

III.

Denies the allegations contained in paragraph III of the complaint.

IV.

Denies the allegations contained in paragraph IV of the complaint, except that it is admitted that the trustees under the will of John B. Bryan, deceased, received trust net income during 1944 in excess of \$18,356.36.

V.

Denies the allegations contained in paragraph V of the complaint, except that it is admitted that the trustees under the will of John B. Bryan, deceased, as such trustees, paid to plaintiff during 1944, sums totalling \$18,356.36.

VI.

Denies the allegations contained in paragraph VI of the complaint, except that it is admitted that on March 8, 1945, plaintiff filed with defendant as United States Collector of Internal Revenue at Los Angeles, California, both being residents of Los Angeles and citizens of the United States and California, her income tax return for the year 1944, showing gross income of \$45,086.99, which included \$18,356.36 which plaintiff had received from the trustees under the will of John B. Bryan, deceased, and that the said return showed tax due of \$22,388.23, and that Exhibit C attached to the complaint is a true copy of such return.

VII.

Denies the allegations contained in paragraph

VII of the complaint, except that it is admitted that plaintiff paid to defendant on account of the tax shown on her return for 1944, the amounts set forth. [65]

VIII.

Denies the allegations contained in paragraph VIII of the complaint, except that it is admitted that on May 6, 1946, plaintiff filed in the proper manner a claim for refund of taxes for 1944 in the amount of \$14,510.27, that the claim was disallowed in full by the Commissioner of Internal Revenue, and that notice of the rejection was given under date of December 23, 1947, and that Exhibit 1 attached to the complaint is a true copy of the claim for refund except as to the exhibits, and that Exhibit 2 is a true copy of the notice of rejection, and defendant denies the allegations contained in the claim for refund except insofar as similar allegations in the complaint are admitted in this answer.

IX.

Denies the allegations contained in paragraph IX of the complaint, except that it is admitted that in her return for 1944, plaintiff reported a tax due of \$22,388.23 and the payment of \$23,024.09, and showed an overpayment of \$635.86, which plaintiff directed be credited on her 1945 estimated tax.

X.

Denies the allegations contained in paragraph X of the complaint.

Second Defense

As a second and separate defense to the allegations contained in plaintiff's complaint, the defendant alleges that said complaint fails to state a claim against the defendant upon which relief can be granted.

Wherefore, having fully answered, the defendant prays that he be hence dismissed with his costs in this behalf expended.

JAMES M. CARTER,
United States Attorney.

E. H. MITCHELL, and

GEORGE M. BRYANT,
Assistant United States
Attorneys.

EUGENE HARPOLE,
Special Attorney, Bureau
of Internal Revenue.

By /s/ E. H. MITCHELL,
Attorneys for Defendant.

Affidavit of service by mail attached.

[Endorsed]: Filed September 15, 1948. [66]

[Title of District Court and Cause.)

STIPULATION OF FACTS

The parties hereto hereby stipulate and agree to the facts herein set forth and agree that the instant suit for the refund of income taxes paid to the Collector of Internal Revenue for the Sixth Collection District of California shall be submitted upon such stipulated facts and such argument as shall be offered in connection therewith. The execution and filing of this stipulation shall not preclude either party from offering and including such additional evidence as is not inconsistent therewith.

I.

John B. Bryan died on September 18, 1938, a resident of California, leaving a will, a true copy of which is attached hereto and marked "Exhibit A," to be incorporated herein as though set forth in full. Thereafter, said will in proceeding No. 179,740 in the Superior Court of the State of California, in and for the County of Los Angeles, [68] on October 13, 1938, was admitted to probate.

II.

Thereafter proceedings were had in the administration of said estate, and on or about January 13, 1944, the said Probate Court settled the Sixth and Final Account of the Executors of said will and directed a final distribution of the estate of the said John B. Bryan, deceased. A true copy of said order and decree is attached hereto and marked

Exhibit "B," to be incorporated herein as though set forth in full. By said order net assets in the sum of \$452,698.89 were distributed in accordance with the terms of said will to Margaret Bryan Smith and the Security-First National Bank of Los Angeles, a National banking association, as trustees upon the trust therein set forth in said will. Margaret Bryan Smith is a beneficiary of said trust as well as one of the trustees, and is the plaintiff in this action. She is the daughter of John B. Bryan, deceased. Since the distribution the said trustees have been serving as trustees of said trust.

III.

During the taxable year 1944, the trust received net income, after deductions, in the sum of \$24,348.14. Distributions made by the Trustees to beneficiary, Margaret Bryan Smith, during the taxable year 1944, totaled \$18,356.36, which sum was equivalent to 5% of the fair market value of the said trust estate as computed under the provisions of the trust.

IV.

The Fiduciary Income Tax Return filed by the co-trustees of the John B. Bryan Trust with the Collector of Internal Revenue for the Sixth Collection District of California, covering the taxable year 1944, reported total income in the sum of \$26,663.91. After deducting trust expenses in the sum of \$2,315.77, a deduction in the sum of \$18,356.36 being the amount distributed to beneficiary, Margaret Bryan Smith, during the year 1944, was

claimed by the fiduciaries in computing net income of the trust taxable to the fiduciary. [69]

Margaret Bryan Smith, beneficiary under the John B. Bryan Trust, in her Individual Income Tax Return for the taxable year 1944, reported gross income in the sum of \$45,086.99, which sum included the sum of \$18,356.36 distributed to her during the year 1944 under the terms of the said trust. Total tax liability reflected by the said return was \$22,388.23, against which liability Margaret Bryan Smith had made payments to the Collector of Internal Revenue for the Sixth District of California under the 1944 declaration of estimated tax in the sum of \$23,024.09, which resulted in an overpayment of \$635.86. By letter dated December 18, 1945, the said Collector advised Margaret Bryan Smith that computation of her alternative tax had reduced the total tax liability to \$22,083.53, thereby increasing her overpayment to \$940.56, which overpayment was credited to her 1945 estimated tax.

V.

On May 6, 1946, Margaret Bryan Smith filed a claim for refund of \$14,510.27, with the Commissioner of Internal Revenue on the ground that she had erroneously included the sum of \$18,356.36, received by her in 1944 as distributions under the John B. Bryan Trust, in reporting her gross income for the taxable year 1944. The said claim for refund was rejected by the Commissioner of Internal Revenue, and notice of such rejection was transmitted to Margaret Bryan Smith on December 23, 1947.

This action for refund of income taxes was commenced on March 18, 1948, by plaintiff who is the owner and holder of said claim for refund. Said claim for refund and said notice of claim rejection are referred to in Paragraph VIII of plaintiff's complaint and true copies are attached thereto.

Dated: This 6th day of June, 1949.

JAMES M. CARTER,
United States Attorney.

E. H. MITCHELL and
EDWARD R. McHALE,
Assistant U. S. Attorneys.

EUGENE HARPOLE,
ROBERT D. SCOTT and
JAMES D. PETTUS,
Special Attorneys, Bureau
of Internal Revenue.

By /s/ EUGENE HARPOLE,
Attorneys for Harry C. Westover, Collector of Internal Revenue for the 6th Collection District of California.

RALPH W. SMITH,
JOHN MOORE ROBINSON and
ROBERT M. HIMROD,

By /s/ ROBERT M. HIMROD,
Attorneys for Plaintiff,
Margaret Bryan Smith.

Trust No. TA-2048

For Period From January 1, 1944, to December 31, 1944.

This account is presented herewith, showing the condition of the trust estate and reporting the acts of the trustee. You are referred to the accompanying statement for details concerning these matters. Please study the whole account carefully, but note in particular the following: The investments made for the trust and the securities and/or properties of which the trust estate now consists: That the security and properties as received by the trustee and shown by its last account have been retained by it during the period covered by this account except as sale or other disposition, is shown by this statement. If any of the matters referred to are not clear to you, please advise us immediately.

Date	Items	Income Payments	Receipts Payments	Principal Receipts
1944	Transferred from Probate Account A-1074, Estate of John B. Bryan, Deceased, per Court Order settling Final Account		\$39,391.39	
Jan. 31	Less: Paid to Margaret Bryan Smith as Income	\$17,112.09		
	Subsequent Disbursements chargeable to Principal, Appraisal Fee	62.38		
	Cost of Certified Copy of Letters Testamentary .....	.60		
	Balance Inheritance Tax and Interest	1,667.70		
	Cash in Term Savings Account	14,666.34		
			33,509.11	\$ 5,882.28

Date	Items	Income		Principal	
		Payments	Receipts	Payments	Receipts
Feb. 25	Transferred from Probate Account A-1074, Estate of John B. Bryan, Deceased: Income receipts subsequent to date of Court Order settling Final Account— 1/18/44: 350 Shs. American Tel. and Tel. Co. Dividend of 1/15/44 1/31/44: 700 Shs. General Electric Co. Dividend of 1/25/44 2/8/44: 20 Shs. Lanver Publishing Co. Dividend of 2/1/44	\$	787.50 245.00 50.00		
Mar. 21	Transferred from Probate Account A-1074, Estate of John B. Bryan, Deceased: Income receipts subsequent to date of Court Order settling Final Account— 3/7/44: 50 Shs. Westinghouse Elec. Co. Dividend of 2/29/44 3/9/44: 9 Shs. Washington Ry. and Elec. Co. Dividend of 2/29/44 3/10/44: 5056 Shs. Lawyers Co-op. Publishing Co. Dividend of 3/10/44 3/14/44: 400 Shs. United States Steel Corp. Dividend of 3/3/44		50.00 2.03 2,022.40 400.00		
28	Federal and N.Y. State Transfer Tax on Various Securities Transferred from A-1074 Principal Cash Reserved for Closing Expense Less: Expended 1/17/44 cost of 4 Certified Copies of Court Order settling final a/c.....			\$	529.08

VARIOUS STOCKS:

45.45

31 Transferred to Probate a/c A-1074

Amount necessary to complete payment of 1943

Federal Income Tax

53.93

Transferred from Probate a/c A-1074

Dividend of 3/15/44 on 900 Shs.

Bancroft-Whitney Co.\$675.00

And Extra dividend 225.00

900.00

Apr.

3 Postage and Insurance on various securities.....

22.11

4 Margaret Bryan Smith—Distribution

3,370.64

7 450 Shs. Eastman Kodak Company Common—No P. V.

Dividend payable 4/1/44

562.50

10 Transfer Tax on 50 Shs. Westinghouse Electric and

Mfg. Co. Common Stk.

1.75

13 Postage and Insurance from N.Y. on

450 Shs. Eastman Kodak Co.....

.90

Margaret Bryan Smith

Payment to 4/13/44

1,685.32

14 Transfer Tax on 450 Shs. Eastman Kodak Co.

22.50

18 Transferred from A-1074

Refund of Federal Estate Tax and Interest thereon.....

5,305.52

19 2 Shs. Pacific Gas & Electric Co. Common—P. V. \$25

Dividend payable 4/15/44

3.00

25 Refund of N.Y. State Transfer Tax on

350 Shs. American Tel and Tel. Co.....

10.50

Date	Items	Income Payments	Receipts	Principal Payments	Receipts
Apr. 28	Transferred from A-1074—Dividend to 4/15/44 on 350 Shs. American Tel. and Tel. Co. Capital P.V. \$100..... Cost of Postage and Insurance on shipment of Stock to Pasadena		787.50		.34 12.00
	Transfer Tax on 150 Shs. Henry Holt and Co.....				
May 2	700 Shs. General Electric Co. Common—No P.V. Dividend payable 4/25/44 .....		.245.00		
10	\$2,500 Henry Holt & Company, Inc. 25 Yr. 5% Inc. Debs. Due 1/1/69				
12	Interest due 5/1/44..... Margaret Bryan Smith Payment—5/13/44		41.67		
29	L. A. County—1944 Personal Property Tax.....\$	6.90		1,685.32	
June 2	Dr. C. V. C. Comfort, Payment in full for professional services as witness in connection with tax litigation re: Estate of John B. Bryan, Deceased				
5	900 Shs. Bancroft-Whitney Co. Capital—No P.V. Dividend payable 6/1/44			150.00	
	Extra dividend		675.00		
	50 Shs. Westinghouse Electric Corp. Common—P.V. \$50 Dividend payable 5/30/44		225.00		
	Trustee's Fees		50.00		
	From 1/13/44 to 2/13/44 at 1/2 of 1% on 353,513.....		147.30		
	From 2/13/44 to 3/13/44 at 1/2 of 1% on 351,001.....		146.25		
	From 3/13/44 to 4/13/44 at 1/2 of 1% on 353,520.....		147.30		
	From 4/13/44 to 5/13/44 at 1/2 of 1% on 359,510.....		149.80		

June 6	Margaret Bryan Smith				
	Reimbursement of funds paid to Drs. Leon Campbell, James Harvey, and H. C. Bumpus in connection with determining Federal Estate Tax.....			150.00	
8	9 Units Washington Ry. & Elec. Co. Ctf. of Bene. Ownership of Common Stk. P. V. \$100				
	Dividend payable 5/31/44		2.02		
9	5056 Shs. Lawyers' Co-op. Publishing Co. of Rochester Common—No P. V.				
	Dividend payable 6/1/44		2,022.40		
13	Margaret Bryan Smith				
	Payment—6/13/44			1,685.32	
June 13	Trustee's Fees				
	From 5/13/44 to 6/13/44 at 1/2% on 361,587.....	150.66			
15	400 Shs. United States Steel Corp. Common—No P. V.				
	Dividend payable 6/30/44		400.00		
July 7	450 Shs. Eastman Kodak Co. Common—No P. V.				
	Dividend payable 7/1/44		562.50		38.58
12	Refund on a/c Federal Income Tax 1940.....				
	Interest		7.28		
13	Margaret Bryan Smith				
	Payment—7/13/44			1,685.32	
	Trustee's Fees				
	From 6/13/44 to 7/13/44 at 1/2% on 360,713.....	150.30			
	Transferred from Income to Principal.....	10,000.00			10,000.00
17	Term Savings Account Union Nat'l Bank of Pasadena, Pasadena, Calif.				
	Interest to 6/30/44				
19	Revenue Stamps in payment of Federal Transfer Tax on Stock		56.67		.05

Date	Items	Income		Principal	
		Payments	Receipts	Payments	Receipts
July 21	350 Shs. American Tel. & Tel. Co. Capital—P.V. \$100 Dividend payable 7/15/44		787.50		
	2 Shs. Pacific Gas & Electric Co. Common—P.V. \$25 Dividend payable 7/15/44		1.00		
Aug. 2	700 Shs. General Electric Co. Common—No P.V. Dividend payable 7/25/44		245.00		
8	20 Shs. Lawyers' Co-op. Publishing Co. of Rochester 5% Cum. Pfd. P.V. \$100 Dividend payable 8/1/44		50.00		
11	Margaret Bryan Smith Payment—8/13/44			1,685.32	
	Trustee's Fees From 7/13/44 to 8/13/44 at 1/2% on 360,006	150.00			
Sept. 5	Additional Federal Income Tax for 1942			104.00	
	Interest to 9/1/44	9.13			
8	5056 Shs. Lawyers' Co-op. Publishing Co. of Rochester— Common—No P.V. Dividend payable 9/1/44		2,022.40		
9	Units Washington Ry. & Elec. Co. Ctf. of Bene. Owner- ship of Common Stk. P.V. \$100 Dividend payable 8/30/44		2.03		
50	Shs. Westinghouse Electric Corp. Common—P.V. \$50 Dividend payable 8/30/44		50.00		

Sept. 13	Margaret Bryan Smith				1,685.32
14	Payment—9/13/44				
14	400 Shs. United States Steel Corp. Common—No. P.V.				
	Dividend payable 9/10/44			400.00	
	Trustee's Fees				
	From 8/13/44 to 9/13/44 at 1/2% on 360,190		150.08		
21	900 Shs. Baneroft-Whitney Co. Capital—No P.V.				
	Dividend payable 9/18/44			675.00	
	Extra Dividend			225.00	
Oct. 6	450 Shs. Eastman Kodak Co. Common—No P.V.				
	Dividend payable 10/1/44			562.50	
13	Margaret Bryan Smith				
	Payment 10/13/44				1,624.60
17	4 Shs. Pacific Gas & Electric Co. Common—P.V. \$25				
	Dividend payable 10/15/44			2.00	
19	350 Shs. American Tel. & Tel. Co. Capital—P.V. \$100				
	Dividend payable 10/15/44			787.50	
Nov. 3	700 Shs. General Electric Co. Common—No P.V.				
	Dividend payable 10/25/44			245.00	
6	\$2,500 Henry Holt & Co., Inc. 25 yr. 5% Inc. Debs.— Due 1/1/69				
	Interest due 11/1/44			62.50	
13	Margaret Bryan Smith				
	Payment—11/13/44				1,624.60
29	Trustee's Fees				
	From 9/13/44 to 10/13/44 at 1/2% on 391,366		163.07		
29	Trustee's Fees				
	From 10/13/44 to 11/13/44 at 1/2% on 390,895		162.87		
Dec. 4	50 Shs. Westinghouse Electric Corp. Common—P.V. \$50				
	Dividend payable 11/30/44			50.00	

Date	Items	Income Payments	Receipts	Principal Payments	Receipts
Dec. 8	9 Units Washington Ry. & Elec. Co. Ctf. of Bene. Ownership of Common Stk. P.V. \$100				
11	Dividend payable 11/30/44		2.02		
	5056 Shs. Lawyers' Co-op. Publishing Co. of Rochester—Common—No P.V.				
13	Dividend payable 12/1/44		2,022.40		
	Margaret B. Smith				
	Payment—12/13/44			1,624.60	
	Trustee's Fees				
14	From 11/13/44 to 12/13/44 at 1/2% on 391,019	162.92			
	400 Shs. United States Steel Corp. Common—No P.V.				
20	Dividend payable 12/10/44		400.00		
	900 Shs. Bancroft-Whitney Co. Capital—No P.V.				
	Dividend payable 12/15/44		675.00		
	Extra dividend		675.00		
27	Transferred from Income to Principal	8,000.00			8,000.00
	Co-Trustee's Fees				
	Margaret B. Smith allowed per Court order approving Trustee's 1st a/c	595.84			
28	5056 Shs. Lawyer's Co-op. Publishing Co. of Rochester—Common—No P.V.				
	Extra dividend 12/20/44		5,056.00		
Income Cash on Hand 12/31/44		\$20,292.42	\$26,411.74	\$19,448.47	\$29,331.28
Principal Cash on Hand		6,119.32		9,882.81	
		\$26,411.74	\$26,411.74	\$29,331.28	\$29,331.28

[Title of District Court and Cause.]

STIPULATION AMENDING EXHIBIT
ATTACHED TO COMPLAINT

It Is Hereby Stipulated Between the Parties that Exhibit "B" of Exhibit 1 attached to the complaint (which purports to be a copy of an order and decree of distribution prior to final settlement in the estate of Marcius C. Smith, sometimes known as Marcius Curtis Smith and as M. C. Smith, inadvertently attached to said Exhibit 1) may be amended by striking out the same and substituting the annexed copy of the order settling sixth and final account by Margaret Bryan Smith et al as executors in the matter of the estate of John B. Bryan, deceased, as Exhibit B of said Exhibit 1, which is a true copy of the order settling sixth and final account, etc., attached to the original claim for a refund; and that said Exhibit B is a true copy of the documents of which it purports to be a copy.

Dated: May 31st, 1949.

/s/ RALPH W. SMITH,
Attorney for Plaintiff.

/s/ E. H. MITCHELL,
Asst. U. S. Attorney. [98]

So ordered.

Dated this 13 day of May, 1949.

/s/ PEIRSON M. HALL. [99]

EXHIBIT B OF EXHIBIT No. 1

In the Superior Court of the State of California
In and for the County of Los Angeles

No. 179740

Order Settling Sixth and Final Account by Margaret Bryan Smith and Security-First National Bank of Los Angeles, as Executors and for the Payment of Statutory Fees and Order for Final Distribution of Said Estate

In the Matter of the Estate of

JOHN B. BRYAN,

Deceased.

The Sixth and Final Account and Report of Margaret Bryan Smith and Security-First National Bank of Los Angeles, a national banking association, Executors of the above-entitled estate, came on regularly for hearing this 29th day of December, 1943, before the above-entitled Court, in Department 24 thereof, Honorable Thomas C. Gould presiding, David D. Stuart appearing as counsel for petitioners and all notices of said hearing having been duly given as required by law and no person appearing to except to or contest said account or petition, the Court after hearing the evidence finds that all the allegations of said account and petition are true and that said account and report is correct;

The Court further finds that the thirty-two shares of the Detroit Edison Company capital stock received by the Executors as dividends on the two

hundred shares of the North American Company, an asset of the estate and two shares of the Pacific Gas and Electric Company common stock received by them as dividends on the same two hundred shares of North American Company stock, are income and should be distributed along with the other income to the beneficiary entitled thereto under the will.

That the said Margaret Bryan Smith is the only heir at law of said decedent and that she and her daughters, Margaret Joan Smith and Grace Patricia Smith, now Grace Patricia Smith Tomaso, are now surviving. [100]

| That said account should be settled as rendered and final distribution of said estate ordered.

It Is Ordered, Adjudged and Decreed by the Court that Said account and report is hereby settled and approved and that said Executors have in their possession belonging to the estate, after deducting the credits to which they are entitled, assets in the sum of \$452,698.89, of which \$39,391.39 is in cash and the balance in the sum of \$413,307.50 is in assets other than cash. That the net income received during the accounting period is the sum of \$18,644.09, from which there should be deducted the 1942 Federal Income Tax in the sum of \$1,103.05 and the 1942 California Income Tax in the sum of \$387.45 and the 1943 Personal Property Tax in the sum of \$41.50. This leaves a net income for said accounting period available for distribution in the sum of \$17,-112.09, which sum is hereby ordered distributed to Margaret Bryan Smith together with all additional

net income received from the termination of the accounting period to the date of this decree of final distribution. That said thirty-two shares of Detroit Edison Company capital stock and said two shares of common stock of the Pacific Gas and Electric Company, is ordered distributed to said Margaret Bryan Smith, and the Executors are further ordered to pay to themselves, as a balance of their statutory executor's fees, the sum of \$371.95 each, and to pay to their attorney, for the balance of his statutory fee, the sum of \$743.90.

It Is Further Ordered, Adjudged and Decreed that the balance of the estate, and all other property hereinafter discovered to belong to said estate, be distributed to Margaret Bryan Smith and the Security-First National Bank of Los Angeles, a national banking association, as Trustees, and the survivor and/or successor of her or it, to be held in trust for the uses and purposes hereinafter set forth:

Article III (of will)

The said Trustees shall enjoy, have and possess and they are hereby vested with full, absolute and exclusive dominion and discretion over said trust property or any property forming a part of the corpus of said trust, except as hereinafter, in "Article V," limited and restricted, with full power to collect and receive all dividends profits, interest, rents and other income of whatsoever nature accruing thereon or receivable therefrom and are hereby authorized to invest, as herein limited and restricted, and reinvest and keep invested the whole or any

part of the principal of said trust, as trustee hereof. [101]

Article IV (of will)

Powers of Trustees: Trustees, to carry out the express purposes of this trust, and in aid of its execution and the proper administration, management and disposition of the trust estate, subject only to the limitations and restrictions hereof, are specifically vested and clothed with the following powers, in addition to any other powers herein conferred:

(a) To possess, manage, control, grant, warrant, bargain, sell, convey, exchange, convert, encumber, mortgage, hypothecate, trade, loan, lease for a term or terms either within or beyond the duration of this trust, pledge, assign as collateral for a loan or otherwise, partition, divide, subdivide, syndicate, improve, loan, re-loan, invest and reinvest the said trust properties or any part thereof or any interest therein, at such time or times and in such manner, either public or private, and upon such terms as to them may seem in their absolute and uncontrolled judgment to be for the best interest of said trust, and may substitute other property for any portion thereof sold or otherwise disposed of, and invest the said trust properties in whatever form it may take in such securities and property as shall the best judgment of said trustees dictate.

(b) To execute and deliver proxies, options, powers of attorney, bills of sale, leases, deeds, agreements, satisfactions of liens, encumbrances, or mortgages and other instruments in writing and any and all conveyances, by deed or otherwise, that

the said Trustees may deem necessary or advisable in administering said trust and performing their duties and offices hereunder. Purchasers and other persons who shall pay any trust monies to said Trustee shall be exempt from all responsibility with respect to the application of the same and from the necessity in inquiring into the regularity, validity or propriety of any disposition made or purported to be made under the trust or powers contained in this instrument, provided the same upon its face does not appear to be irregular.

(c) To own, buy, sell, or hold real estate or personal property, whether tangible or intangible, anywhere without limit; to acquire and own stock in or entire charters of corporations; to borrow money for the trust, using and pledging the trust property for payment, and to engage the trust funds and properties in any kind of enterprise or investment which their judgment dictates for intended gain to the trust or otherwise. To grant options and sell properties of the trust at public auction, at a broker's board or at private sale for cash or upon credit and upon terms and conditions determined by them. To improve any real property subject to this trust, repair, alter, build or extend any improvements thereon of [102] such character, kind, amount, cost, and from such funds or property subject to this trust as they may deem advisable. To grant, make, renew or take leases of property even though the leases or renewal extends beyond the trust term, whether the rights and privileges are on, above or

below the surface of real property, for any purpose, on a cash, deferred or installment payment, royalty, optional or other basis.

(d) To receive, invest and hold all real and personal property, stocks, bonds, or chattels at any time belonging to the trust estate in their name as Trustees, or said Trustees may hold all or any of said trust property in the name of any person they may elect, or in the name of a nominee or agent or in a street name, and shall not be responsible for any loss or liability for so doing. To vote, manage, sell and reinvest said trust property and every part thereof, either original or subsequent, or at any time held by them in such loans, securities and property, whether real or personal, as to the said Trustees may seem wise and expedient. All statutory requirements and other restrictions touching the investment of trust funds now or hereafter prescribed by law shall not be prohibitions, conditions or limitations upon the actions of the said Trustees. In this regard the Trustees in the management and investment of the trust may do any lawful thing which other citizens may do in any state or country in relation to the management and investment of property.

(e) To consent to the consolidation, merger, reorganization or other corporate change of any corporation whose securities from a part of this trust, or to the organization of a corporation and the exchange of any part of the trust properties for stock of any corporation. To consent or agree to the dissolution of any corporation of which the trust may

at any time be a stockholder. To represent the trust in all suits or legal proceedings in any Court of law or equity or before any other body or tribunal; to employ counsel, to commence suits or proceedings, or to defend the same, and to release, compound, compromise or submit to arbitration any and all claims and/or demands and all matters of dispute to which the trust or Trustees may be a party, or in which any trust property or any activity of any Trustee as such may be involved whenever and in such manner as such Trustees in their judgment may deem proper and in the name of the trust or in the name of Trustees.

(f) To employ, hire, engage, retain and contract for managers, agents, servants, help and employees and to discharge same.

The foregoing specifications of power and authority so granted to the Trustees shall not be deemed to be restrictions upon the general powers and discretions implied or given to the Trustees, nor limitations thereof, but the Trustees shall, in respect to all [103] trust properties, whether tangible or intangible, held by them have unrestricted powers in respect thereto, subject to the limitations and restrictions specifically herein imposed upon the said Trustees in relation to the investment, reinvestment, administration and/or management of the trust estate.

Article V (of will)

Restrictions and Limitations Upon Trustees: Trustees are hereby vested with all powers and authority expressly herein granted, and in addition thereto all powers and authority which a natural

erson may possess or exercise in relation to property, with the following limitations and restriction, that is to say, that no sale or other change (other than by operation of an instrument or by law) shall be made by the Trustees or the survivor of them, in the corpus of said trust and no investment or reinvestment of any part of the corpus of said trust including all withheld or accumulated income, shall at any time be made by the said Trustees without first having secured the written consent of a majority of the following named persons and the survivors of them and/or their successors in office: Mrs. Margaret Bryan Smith, of Pasadena, California; George M. Wood Esq., Theodore C. Briggs, Esq., Ezra Hale, Esq. and Arthur J. Gosnell, Esq., all of Rochester, New York; and Fred D. Moss, Esq., of Bancroft-Whitney Company, San Francisco, California.

The foregoing persons just named are designated as an Investment and Advisory Committee. Said committee shall be never less than three (3) persons and at such time or times when only two (2) persons compose said committee these two shall appoint another person as a member thereof; the Trustees to be immediately advised in writing of the name and address of the person or persons selected.

The registry of a letter properly addressed, with postage prepaid, to the last known address by the Trustees to any one or more of said persons composing the said Investment and Advisory Committee requesting that said person act in writing in relation to the power or authority vested herein in such

person relative to the subject matter of said trust, and the failure of the Trustees to receive a reply to said letter within a period of fourteen (14) days after posting same, shall be considered as an affirmative act and vote on the part of the addressee of said letter, and direction to the Trustees to act affirmatively in regard to the matter in said letter contained.

Article VI (of will)

Suggestions to Trustees and Investment and Advisory Committee: [104]

Fully appreciating the uncertainties of the future and anticipating the difficulties in advising the type of investment in which the corpus, or any part thereof of said trust should flow, without attempting to place any additional limitations upon the investments and reinvestment of any part of the corpus, it is suggested that no part of the corpus be invested or reinvested in purely land, building, theatre or irrigation stock or bonds, or in the acquisition of syndicate interests, but that securities or obligations or unconditionally guaranteed obligations of the government of the United States of America or of a sovereign state be selected in preference to obligations of political subdivisions of a sovereign state. In the selection of common stocks, preferred stocks or bonds, it may be wisdom to select nationally known companies with A rating or better, whose financial condition is satisfactory, and whose interest requirements were fully met for a long period of years immediately preceding the time of the investment.

No restriction is placed upon my Trustees in retaining in the trust any property that they might receive through distribution of this estate.

At the time of making his will, deceased was the president and chairman of the executive committee of Bancroft-Whitney Company, of San Francisco, California, and had been for many years directly interested in this company, and in the Lawyers-Cooperative Publishing Company of Rochester, New York. He possessed unbounded faith in the integrity and competency of the officers of these companies and was of the opinion that the stock which he owned in these companies is and shall continue to be an excellent investment as part of the corpus of the trust herein created. It was his hope, therefore, that profound consideration be given to the history, substance, merit, and prospective worth of these companies before any of his holdings therein were disposed of.

Article VII (of will)

Definition of Net Income: From the gross income received and derived from the trust properties and/or from the principal thereof, if the Trustees deem that necessary, said Trustees shall first fully pay and discharge any and all taxes, assessments (both general and special), including governmental charges and costs, attorney's fees, expenses and liabilities incurred by them as such Trustees, or to which they may be entitled or which they may incur in connection with the care, administration, management, protection, preservation or distribution of

said trust property, including a reasonable compensation to said Trustee for [105] their services as Trustees hereunder. The remaining income shall be net income, withheld, accumulated or payable as follows:

(a) The net income received and derived from the trust estate shall be by said Trustees, during the natural life of his daughter, Margaret Bryan Smith, retained by them and as and when received immediately added to the principal or corpus of said trust and thereafter such income and profits shall be considered as principal of said trust.

(b) Said Trustees, beginning from the date of the distribution of the estate to them as Trustees, shall pay each year in convenient installments, monthly if possible, to his said daughter, Margaret Bryan Smith, during the term of her natural life, five per cent (5%) of the fair market value of the corpus of said trust. In determining the fair market value of the corpus of said trust and the percentage thereof herein directed to be paid to his said daughter, the said Trustees yearly on the anniversary date of his death shall cause to have the then trust corpus appraised by a banking institution or trust company in the County of Los Angeles, and for the year immediately following shall accept this said appraisal and pay to his said daughter five per cent (5%) thereof for each respective annual period. Upon the unanimous consent of the Trustees the Corporate Trustee may act as the Appraiser.

(c) From and after the death of his said daughter the surviving Trustee shall pay and distribute

the entire net income from said trust estate in equal parts, share and share alike, to the then living children of his said daughter and the issue of any one of them who may have deceased, per stirpes, and to the lineal descendants of any deceased issue of theirs by right of representation, so long as the last one of the children of his said daughter, to wit, Grace Patricia Smith and Margaret Joan Smith, now living shall live.

(d) In the event that any one or more of the children now born or hereafter to be born to the said Margaret Bryan Smith should decease without issue or lineal descendants of issue her or him surviving or should leave issue and said issue become extinct, the share of the net income of the surviving child or children of the said Margaret Bryan Smith and the issue of any deceased child and lineal descendants of any deceased issue, per stirpes, shall be equally augmented thereby.

(e) Upon the death of the last living one, to wit, the last survivor of his daughter, Margaret Bryan Smith, and her now living children, Grace Patricia Smith and Margaret Joan Smith, this trust shall cease and terminate and the Trustee forthwith transfer, grant assign, and deliver, in equal parts and shares, the then corpus and all undistributed income of said trust estate to the then living issue per stirpes, of his daughter, Margaret Bryan Smith and [106] lineal descendants of any deceased issue of his said daughter, the lineal descendants taking by right of representation, thus winding up and forever terminating this trust. Should, at the

time of the termination of this trust, no issue of his said daughter or lineal descendants of any deceased issue be then living, the corpus of said trust, together with all the accumulated income shall be distributed to the then living blood heirs of Margaret Bryan Smith, to be determined by the laws of succession of the State of California now in force and effect.

Article VIII (of will)

Any beneficiary of this trust, subject to the limitations hereof, shall have the the right to purchase any of the trust property and otherwise to deal with the Trustees as freely as strangers to the trust, even though said beneficiary may also be a trustee hereof; and any beneficiary under this will and under the trust herein created shall not *be* reason thereof at any time be precluded from also being a trustee.

Article IX (of will)

The term "Trustee" shall include the original Trustee herein named, to wit, Margaret Bryan Smith, and the Security-First National Bank of Los Angeles, a national banking association, and the survivor of them, and the succeeding and/or appointed Trustee herein nominated and/or selected, as follows:

One of the Trustees hereof shall at all times be a corporate Trustee. Upon the death, resignation, or disqualification of Margaret Bryan Smith, if at that time her oldest living child and issue of any deceased child has attained the age of twenty-one (21) years, such one of her children and issue

thereof is designated and appointed as first succeeding Trustee in the place and stead of his daughter Margaret Bryan Smith. If, upon the happening of that event the oldest living one of her children and issue of any deceased one of them has not attained the age of twenty-one (21) years, then the said Investment and Advisory Committee is directed to nominate and appoint some person, not a corporation, to act as a Co-Trustee with the Corporate Trustee until the oldest child and issue of any deceased child of his daughter attains the age of twenty-one (21) years, at which time such child or issue of any deceased child shall automatically replace the Trustee selected by the said Investment and Advisory Committee.

At all times when possible one of the beneficiaries hereof also shall be a Trustee of the trust herein created and to this end at all times following the death, resignation or disqualification of his daughter, Margaret Bryan Smith, as a Trustee hereof, her oldest child and [107] issue of any deceased child shall succeed in turn as the individual Trustee of the trust herein created.

Article X (of will)

Restriction Upon the Power of Alienation: Each and every beneficiary under this Trust is hereby restrained from, and is and shall be without right, power and authority to sell transfer, pledge, mortgage, hypothecate, encumber, alienate, anticipate, or in any other manner assign, affect or impair his or her beneficial and/or legal right, title, interest,

claim and estate in and to the income and/or principal of the trust created and/or benefits conferred under this Trust, nor shall the right, title, interest and estate of any beneficiary hereunder be subject to the rights or claims of creditors of any beneficiary nor subject nor liable to attachment or judgment or any process of law or court, bankruptcy proceedings or otherwise, and all of the income and/or principal under the trust or benefits conferred under this trust shall be transferable and payable only, solely and exclusively to the designated beneficiary and/or beneficiaries hereunder at the times entitled to take the same under this Trust, and the personal receipts of the designated beneficiary and/or beneficiaries hereunder or their duly authorized attorney or agent shall be a condition precedent to the payment or delivery of the same by said Trustees to each of such beneficiary or beneficiaries.

Article XI (of will)

The profits and losses, if any, arising from any activity of the Trustees as such shall respectively inure to the benefit of or be chargeable against the trust and the Trustees.

Article XII (of will)

In the event that any provision or clause of this Trust shall be declared void, such fact shall not affect any other provision or clause herein and said Trust shall be read and interpreted as if such provision or clause so declared void had never been inserted herein.

Article XIII (of will)

If the benefits to which any person may be entitled under the trust created herein shall, in the discretion of the Trustee, be insufficient to provide such person with suitable support, maintenance, comfort, education and reasonable expenses in case of illness, want or other necessity, then said Trustees may pay to, apply or expend for the use and benefit of such person so much of the principal as the Trustees may deem advisable, but not to exceed such part of the principal as is proportionate to the share of income and corpus such person is at the time entitled to receive hereunder.

This is a trust for maintenance and therefor the Executors are directed to pay the income from the estate to said Margaret Bryan Smith. [108]

Article XIV (of will)

Every gift, devise, bequest and interest given under this Trust shall be delivered free from all estate, succession and inheritance taxes and that such taxes be paid out of the residue of the estate.

Article XV (of will)

In the event of the sale or transfer by the Corporate Trustee as a whole or substantially as a whole of its business or assets or of its liquidation or its being converted, merged, or consolidated with any other company, association or banking institution, the powers and privileges herein granted shall immediately cease and its successor, transferor or substitute shall have no right, title, interest or

privilege as a Trustee hereunder; and the oldest then living income beneficiary of the trust is vested with the power and authority to nominate and appoint another Corporate Trustee instead of the Security-First National Bank of Los Angeles.

Article XVI (of will)

The Trustees are directed to annually prepare and file in the Superior Court, or such other court in which the probate of this estate is filed, in the County of Los Angeles, State of California, a correct accounting and detailed report and statement of the transactions in relation to the trust property, and apply for confirmation thereof. Such report shall be similar to the proceedings now required by law of a guardian for a minor. The report shall specifically disclose the corpus of the trust, the annual disbursements and the gross and net income therefrom. After the death of his daughter, Margaret Bryan Smith, a copy of this annual report or account, prior to the filing thereof, shall be personally delivered to or by registry mailed to each of the then living persons named in "Article V" hereof.

The compensation of the corporate co-trustee under the trust shall be as follows:

(a) An annual compensation for its ordinary or usual duties as co-trustee, a sum equal to one-half of one per cent ($1\frac{1}{2}$ of 1%) of the value of the trust estate.

(b) A reasonable compensation for any unusual or extraordinary services rendered by it as co-trustee.

(c) At the time of the termination of said trust, a sum equal to one per cent (1%) of the then value of the principal of the trust estate, for the final distribution, closing and settlement of the trust.

Grace Patricia Smith is the natural daughter of the said Margaret Bryan Smith, and Margaret Joan Smith is the adopted daughter of said Margaret Bryan Smith.

In the construing of this trust, Margaret Joan Smith is to be considered and deemed [109] to be the issue of the body of said Margaret Bryan Smith, and Margaret Joan Smith's issue, if any, shall be deemed and considered the issue of Margaret Bryan Smith, the same as the issue of her daughter, Grace Patricia Smith.

The assets of said estate now on hand, and so far as is known, are as follows:

Cash	\$39,391.39
350 Shares American Telephone & Telegraph Company Capital Stock P. V. \$100	47,600.00
900 Shares Bancroft-Whitney Company, Capital Stock—No. P. V.....	67,500.00
32 Shares Detroit Edison Company, Capital Stock P. V. \$20—carrying value included with North American Stock.	
450 Shares Eastman Kodak Company Common Stock—No. P. V.....	74,700.00

700 Shares General Electric Co., Common Stock—No. P. V.....	\$26,600.00
100 Shares Henry Holt & Company, Inc. Class "A" Stock, P. V. None.....	625.00
50 Shares Henry Holt & Company, Inc. Class "B" Stock—No. P. V.....	12.50
20 Shares Lawyers Co-op. Publishing Co. of Rochester, 5% Cumulative Preferred Stock, P. V. \$100.....	2,000.00
5056 Shares Lawyers' Co-op Publishing Company of Rochester, Common Stock No. P. V.....	164,320.00
200 Shares North American Company, Common Stock—No. P. V.....	3,350.00
2 Shares Pacific Gas & Electric Company, Common Stock, P. V. \$25, carrying value included with North American Stock).	
1000 Shares United Operating Trust Inc., Capital Stock—No P. V.	
400 Shares United States Steel Corporation, Common Stock—No. P. V.....	21,600.00
9 Units (Participating) Washington Rail- way & Electric Company Certificates for Participating Units of Beneficial Own- ership of Deposited Shares of Common Stock, P. V. \$100.	
50 Shares Westinghouse Electric & Manu- facturing Company Comon Stock, P. V. \$50.....	4,900.00

Decedents 1/16th interest in a Trust, Alexander Miller Trustee, said Trust holding ownership of the SE $\frac{1}{4}$ of the NW $\frac{1}{4}$ of Section 13, Township 28 S., Range 27 E., M.D.B. & M. In Kern County. 100.00

Dated: January 13, 1944.

[Endorsed]: Filed October 5, 1949. [110]

In the District Court of the United States for the
Southern District of California Central Division

No. 8060-PH Civil

MARGARET BRYAN SMITH,

Plaintiff,

vs.

HARRY C. WESTOVER, United States Collector
of Internal Revenue, 6th Collection District,
California,

Defendants.

MEMORANDUM

Hall, J.

Plaintiff's deceased father created a trust by will. It defined "net income" as the gross income received from trust properties less trust expenses, and provided that such net income during the life of the plaintiff should be added to the corpus of the trust and thereafter considered as principle of the trust. It was further provided that the trustees were to

pay plaintiff annually five percent of the fair market value of the corpus of the trust, which was to be determined annually upon appraisal in the manner set forth in the will.¹

In 1944 the net income of the trust was \$24,348.14, and there was distributed to the plaintiff for that year under the trust the sum of \$18,356.36, which was equivalent to 5% of the fair market [111-A] value of the corpus of the trust as computed under the provisions of the trust. The latter sum was de-

¹Article VII of the will reads as follows: "Article VII Definition of Net Income: From the gross income received and derived from the trust properties and/or from the principal thereof, if the Trustees deem that necessary, said Trustee shall first fully pay and discharge any and all taxes, assessments (both general and special), including governmental charges and costs, attorneys' fees, expenses and liabilities incurred by them as such Trustees, or to which they may be entitled or which they may incur in connection with the care, administration, management, protection, preservation or distribution of said trust property, including a reasonable compensation to said Trustees for their services as Trustees hereunder. The remaining income shall be net income, withheld, accumulated or payable as follows:

(a) The net income received and derived from the trust estate shall be by my said Trustees, during the natural life of my daughter, Margaret Bryan Smith, retained by them and as and when received immediately added to the principal or corpus of the said trust and thereafter such income and profits shall be considered as principal of said trust.

(b) My said Trustees, beginning from the date of the distribution of my estate to them as Trustees, shall pay each year in convenient installments, monthly if possible, to my said daughter, Margaret

ducted by the trust in its tax return, but was included in the gross income of the plaintiff in computing her individual income tax for the year 1944. [112]

Plaintiff seeks herein to recover that portion of her 1944 income tax which was paid upon the calculation which included said \$18,356.36 in her gross individual income. Her contention rests upon the claim that the sum received was a bequest of principal of the trust and not a distribution of income.

Bryan Smith, during the term of her natural life, five per cent (5%) of the fair market value of the corpus of said trust in determining the fair market value of the corpus of said trust and the percentage thereof herein directed to be paid to my said daughter, the said Trustees yearly on the anniversary date of my death shall cause to have the then trust corpus appraised by a banking institution or trust company in the County of Los Angeles, and for the year immediately following shall accept this said appraisal and pay to my said daughter five per cent (5%) thereof for each respective annual period. Upon the unanimous consent of the Trustees the Corporate Trustee may act as appraiser.

(c) From and after the death of my said daughter, it is then my wish and I direct that the surviving Trustee pay and distribute the entire net income from said trust estate in equal parts, share and share alike, to the then living children of my said daughter and the issue of any one of them who may have deceased, per stirpes, and to the lineal descendants of any deceased issue of theirs by right of representation, so long as the last one of the children of my said daughter, to wit, Grace Patricia Smith and Margaret Joan Smith, now living shall live.

(d) In the event that any one or more of the children now born or hereafter to be born to the said Margaret Bryan Smith should decease without is-

Both parties agree that if this is true the plaintiff is entitled to recover.

The plaintiff argues strenuously that under the law of California the provisions of the will make the income of the trust corpus, and that hence whatever was paid to the plaintiff was not from income and was not taxable to her as income. Doubtless that is true for all purposes of California law. On that I express no opinion, because the Federal Statute controls, if applicable.

sue or lineal descendants of issue her or him surviving or should leave issue and the said issue become extinct, the share of the net income of the surviving child or children of the said Margaret Bryan Smith and the issue of any deceased child and lineal descendants of any deceased issue, per stirpes, shall be equally augmented thereby.

(e) Upon the death of the last living one, to wit, the last survivor of my daughter, Margaret Bryan Smith, and her now living children, Grace Patricia Smith and Margaret Joan Smith, it is then my wish and I direct that this trust must cease and terminate and my then Trustee forthwith transfer, grant, assign, and deliver, in equal parts and shares, the then corpus and all undistributed income of said trust estate to the then living issue, per stirpes of my daughter, Margaret Bryan Smith, and lineal descendants of any deceased issue of my said daughter, the lineal descendants taking by right of representation, thus winding up and forever terminating this trust. Should, at the time of the termination of this trust, no issue of my said daughter or lineal descendants of any deceased issue be then living, I then direct that the corpus of said trust, together with all accumulated income, be distributed to the then living blood heirs of Margaret Bryan Smith, to be determined by the laws of succession of the State of California, now in force and effect."

Sec. 162 (d) was enacted as part of the Internal Revenue Act of 1942. As stated in *Coleman v. Commissioner*, C. C. A. 3, 151 Fed. (2nd) 235, at 238 "The Congressional Committee Reports show clearly that the law, as declared in the *Whitehouse* (*Burnett v. Whitehouse*, 283 U. S. 149) and *Pardee* (*Helvering v. Pardee*, 290 U. S. 365) cases, was intended to be changed by the 1942 amendment." The constitutionality of that Section is not challenged by the plaintiff. Subdivision (1) thereof, [26 U.S.C. 162 (d), (1)] is directly applicable here. The pertinent portion of that section reads as follows:

"Amounts distributable out of income or corpus: In cases where the amount paid, credited, or to be distributed can be paid, credited, or distributed out of other than income, the amount paid, credited, or to be distributed . . . during the taxable year of the estate or trust shall be considered as income of the estate or trust which is paid, credited, or to be distributed if the aggregate of such amounts so paid, credited, or to be distributed does not exceed the distributable income of the estate or trust for its taxable year." [113]

Under the plaintiff's theory there can be no "distributable income" to the plaintiff because of the provisions requiring the income to be added to the corpus and that 5% of the total be distributed to the plaintiff. The Statute must be read in light of the intention of Congress. Or as Justice Cordoza so aptly put it in *Burnet v. Wells*, 289 U. S. 670 at 675: "One can read in the provisions of the Rev-

enue Acts the record of the Government's endeavor to keep pace with the fertility of invention whereby taxpayers had contrived to keep the larger benefits of ownership and be relieved of the attendant burdens."

To *acceed* to the plaintiff's contention would be to not only disregard the plain intent of Congress, but also to misconstrue the language of the Statute. A provision in a will cannot change the character of the actual earnings of a trust estate after death of the testator under the Internal Revenue laws by simply changing the name of the earnings from income to corpus either upon the receipt of the earnings or at the time of an annual appraisal. As I read the Statute it comes to this; if there actually was income, and if any money was distributable, and the money distributable and distributed, was less than the income, then it was "distributable income" within the meaning of the Statute, and is taxable to the recipient.

Under such construction there would be no actual invasion of the corpus of the trust as it existed on the date of death, and thus no double taxation.

In the instant case the trust actually earned and received as gross [114] income during the year 1944, the sum of \$26,663.91, from which costs and expenses were deducted leaving a net income of \$24,348.41. The will recognizes that the earnings would be "gross income," and that there would be "net income," as it provides in so many words that, "From the gross income * * * the Trustees shall first fully pay and discharge any and all," taxes,

costs, attorney fees, expenses and the like, and that, "The remaining income shall be net income withheld, accumulated or payable" to the plaintiff as hereinbefore indicated during her lifetime, with other provisions for payment after her death of the income. The five per cent (5%) payable to the plaintiff for the year 1944 was the sum of \$18,356.36. It was "distributable" and was distributed to the plaintiff. It was a sum less than the "net income" of the trust, and did not require an invasion of the corpus of the trust as it existed on the date of the testators death, and is thus taxable to the plaintiff under the terms of Section 162 (d), (1), of the Internal Revenue Code.

Judgment will be for the defendant, who will prepare the customary Findings, Conclusions and Judgment.

Los Angeles, California, February 20, 1950.

/s/ PEIRSON M. HALL.

[Endorsed]: Filed February 20, 1950. [115]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled case came on for trial before the Court, sitting without a jury, on June 13, 1949, the Honorable Peirson M. Hall, Judge, presiding. The plaintiff, Margaret Bryan Smith, appeared by Ralph W. Smith, John Moore Robinson, and Robert Himrod, by Robert Himrod, of counsel, and the defendant, Harry C. Westover, Collector of Internal Revenue for the Sixth Collection District of California, appeared by James M. Carter, United States Attorney for the Southern District of California, E. H. Mitchell, Assistant United States Attorney for said District; Eugene Harpole and James D. Pettus, Special Attorneys, Bureau of Internal Revenue, as counsel. The Court having considered the evidence and the briefs of counsel, makes the following:

Findings of Fact

I.

The facts set forth in the stipulation of the parties dated June 6, 1949, are found to be true, and are incorporated herein as though [116] set out in full.

Conclusions of Law

From the foregoing Findings of Fact the Court draws the following conclusions of law:

I.

The Court has jurisdiction of both the parties and the subject matter of this case.

II.

The suit arises under and is governed by the provisions of Section 162(d)(1) of the Internal Revenue Code.

III.

During the taxable year 1944, the John B. Bryan Trust had distributable income, within the meaning of Section 162(d)(1) of the Internal Revenue Code, in excess of the distributions made to beneficiary, Margaret Bryan Smith.

IV.

The distributions in the sum of \$18,356.36 received by plaintiff during the taxable year 1944 as beneficiary of the John B. Bryan Trust constituted distributions of income fully taxable to plaintiff as recipient.

V.

The sum of \$18,356.36 distributed to plaintiff during 1944, as beneficiary of the John B. Bryan Trust, was properly included in the gross income reported on plaintiff's Individual Income Tax Return for the year 1944, and the tax paid thereon was neither illegally nor erroneously collected by the Collector of Internal Revenue.

VI.

Plaintiff's claim for refund in the sum of \$14,510.27, filed on May 6, 1946, was properly rejected by the Commissioner of Internal Revenue.

Under all the evidence and law, judgment should be and is [117] hereby given for the defendant with costs assessed against the plaintiff.

Dated: This 18 day of April, 1950.

/s/ PEIRSON M. HALL,
United States District Judge.

Approved as to Form:

RALPH W. SMITH,
JOHN MOORE ROBINSON and
ROBERT M. HIMROD,

By /s/ ROBERT M. HIMROD,
Attorneys for Plaintiff.

[Endorsed]: Filed April 18, 1950. [118]

The United States District Court Southern District
of California Central Division

No. 8060-PH Civil

MARGARET BRYAN SMITH,

Plaintiff,

vs.

HARRY C. WESTOVER, United States Collector
of Internal Revenue, 6th Collection District,
California,

Defendant.

JUDGMENT

The above-entitled case came on for trial before the Court, sitting without a jury, on June 13, 1949, the Honorable Peirson M. Hall, Judge, presiding. The plaintiff, Margaret Bryan Smith, appeared by Ralph W. Smith, John Moore Robinson, and Robert Himrod, by Robert Himrod, of counsel, and the defendant, Harry C. Westover, Collector of Internal Revenue for the Sixth Collection District of California, appeared by James M. Carter, United States Attorney for the Southern District of California, E. H. Mitchell, Assistant United States Attorney for said District; Eugene Harpole and James D. Pettus, Special Attorneys, Bureau of Internal Revenue, as counsel.

The Court having considered the evidence and the briefs of counsel, and having rendered its decision and made and filed its Findings of Facts and Conclusions of Law, and ordered that judgment

be entered in favor of defendant in accordance with said Findings and Conclusions.

Now, Therefore, by virtue of the law and by reason of the [119] Findings and Conclusions as aforesaid, it is considered by the Court and ordered that defendant recover judgment against plaintiff for its costs to be taxed by the Clerk of this Court and for dismissal of the action. Costs taxed in the sum of \$20.00.

Judgment rendered this 18th day of April, 1950.

/s/ PEIRSON M. HALL,
United States District Judge.

Approved as to Form:

RALPH W. SMITH,

JOHN MOORE ROBINSON and

ROBERT M. HIMROD,

By /s/ ROBERT M. HIMROD,
Attorneys for Plaintiff.

Judgment entered April 18, 1950.

Docketed April 18, 1950.

[Endorsed]: Filed April 18, 1950. [120]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the Plaintiff, Margaret Bryan Smith, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment for Defendant and the whole thereof, entered in the above entitled action on April 18, 1950, in Judgment Book No. 65, page 326.

Dated: This 12th day of May, 1950.

RALPH W. SMITH,

JOHN MOORE ROBINSON and

ROBERT M. HIMROD,

By /s/ ROBERT M. HIMROD,

Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 15, 1950. [121]

[Title of District Court and Cause.]

DESIGNATION AND CONTENTS OF RECORD
ON APPEAL

To the Clerk of the Above Entitled Court:

Appellant hereby designates for inclusion in the record on appeal in the above entitled proceedings, the following:

All the matters required by subdivision G of Rule 75 of the Federal Rules of Civil Procedure, including the following: All the pleadings, all papers and records, all stipulations entered into and all stipulations of fact, the judgment entered in favor of defendant, Appellant's Notice of Appeal, and this Designation of Contents of Record on Appeal.

Dated: This 12th day of May, 1950.

RALPH W. SMITH,

JOHN MOORE ROBINSON and

ROBERT M. HIMROD,

By /s/ ROBERT M. HIMROD,
Attorneys for Plaintiff.

Affidavit of Service by Mail attached.

[Endorsed]: Filed May 15, 1950. [123]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 124, inclusive, contain the original Complaint; Answer; Stipulation of Facts; Stipulation Amending Exhibit Attached to Complaint; Memorandum Opinion; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal and Designation of Record on Appeal and full, true and correct copy of minute order Entered June 13, 1949, which constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing and certifying the foregoing record amount to \$2.00 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 22nd day of June, A.D. 1950.

EDMUND L. SMITH,
Clerk.

[Seal] By /s/ THEODORE HOCKE,
Chief Deputy.

[Endorsed]: No. 12588. United States Court of Appeals for the Ninth Circuit. Margaret Bryan Smith, Appellant, vs. Harry C. Westover, United States Collector of Internal Revenue, Sixth Collection District of California, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed June 23, 1950.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 12588

MARGARET BRYAN SMITH,

Appellant,

vs.

HARRY C. WESTOVER, United States Collector
of Internal Revenue, 6th Collection District,
California,

Appellee.

STIPULATION AS TO CONTENTS OF
RECORD TO BE PRINTED

It Is Hereby Stipulated and Agreed by Appellant and Appellee through their respective counsel that the following portions of the record are necessary for consideration of the questions presented on appeal and shall be printed:

1. Page 2—Names and addresses of attorneys.
2. Pages 3-63, omitting pages 33-56, inclusive—Complaint and Exhibits, but omit title of Court and Cause.
3. Pages 64-66, inclusive—Answer, but omit title of Court and Cause.
4. Pages 68-70, omit pages 71-90 inclusive, include pages 91-96, inclusive—Stipulation of Facts. Omit title of Court and cause.

5. Pages 98-110, inclusive—Omit title of Court and Cause. Stipulation Amending Exhibit Attached to Complaint.

6. Pages 111-115, inclusive—Memorandum of Decision, omitting title of Court and Cause.

7. Pages 116-118, inclusive—Findings of Fact and Conclusions of Law, omitting title of Court and Cause.

8. Pages 119-120, inclusive—Judgment. Omitting title of Court and Cause.

9. Page 121—Notice of Appeal.

10. Page 123—Designation of Contents. Omitting title of Court and Cause.

Clerk's Certificate.

Dated: June 22, 1950.

RALPH W. SMITH,

JOHN MOORE ROBINSON and

ROBERT M. HIMROD,

By /s/ ROBERT M. HIMROD,

Attorneys for Plaintiff-
Appellant.

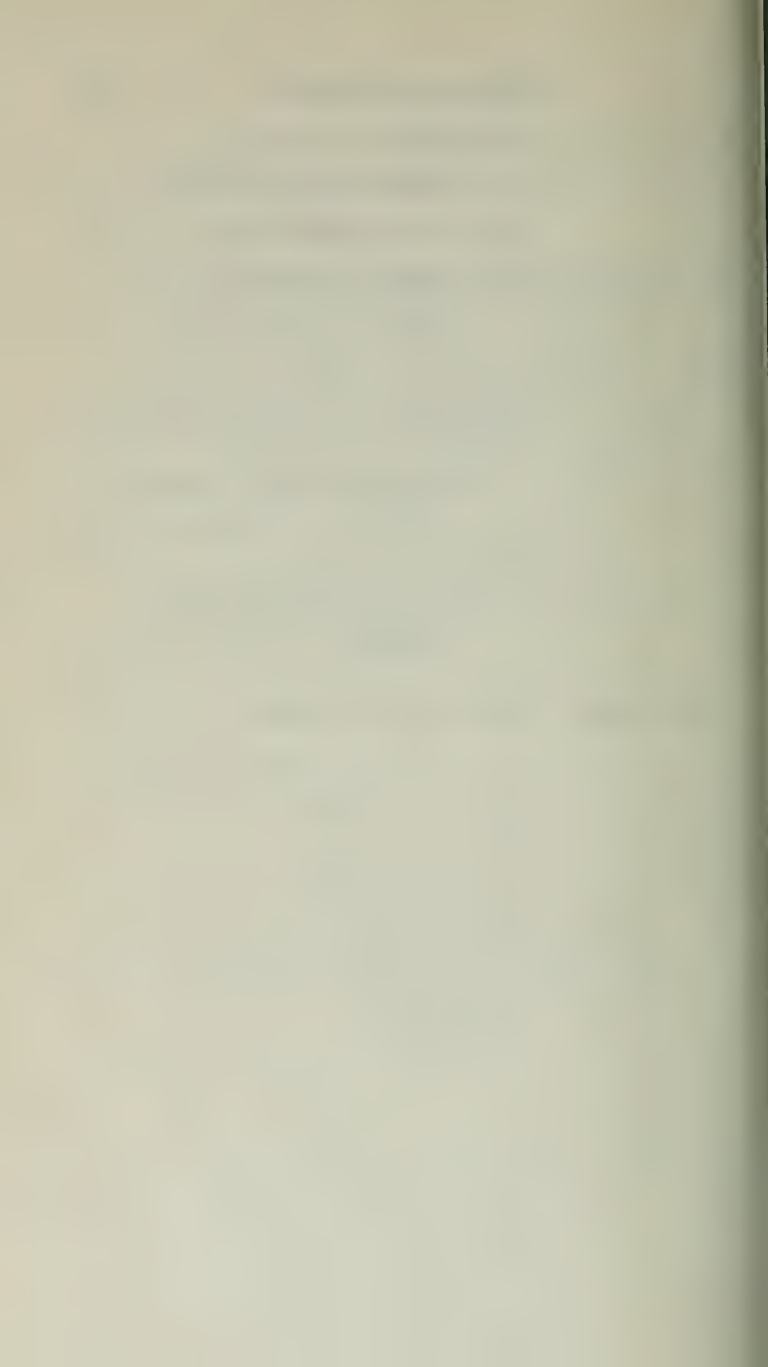
ERNEST A. TOLIN,
United States Attorney,

E. H. MITCHELL and
EDWARD R. McHALE,
Assistant United States
Attorneys,

EUGENE HARPOLE and
FRANK W. MAHONEY,
Special Attorneys, Bureau
of Internal Revenue,

By /s/ EUGENE HARPOLE,
Attorneys for Defendant-
Appellee.

[Endorsed]: Filed June 23, 1950.



No. 12588

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARGARET BRYAN SMITH,

Appellant,

vs.

HARRY C. WESTOVER, United States Collector of Internal
Revenue, Sixth Collection District of California,

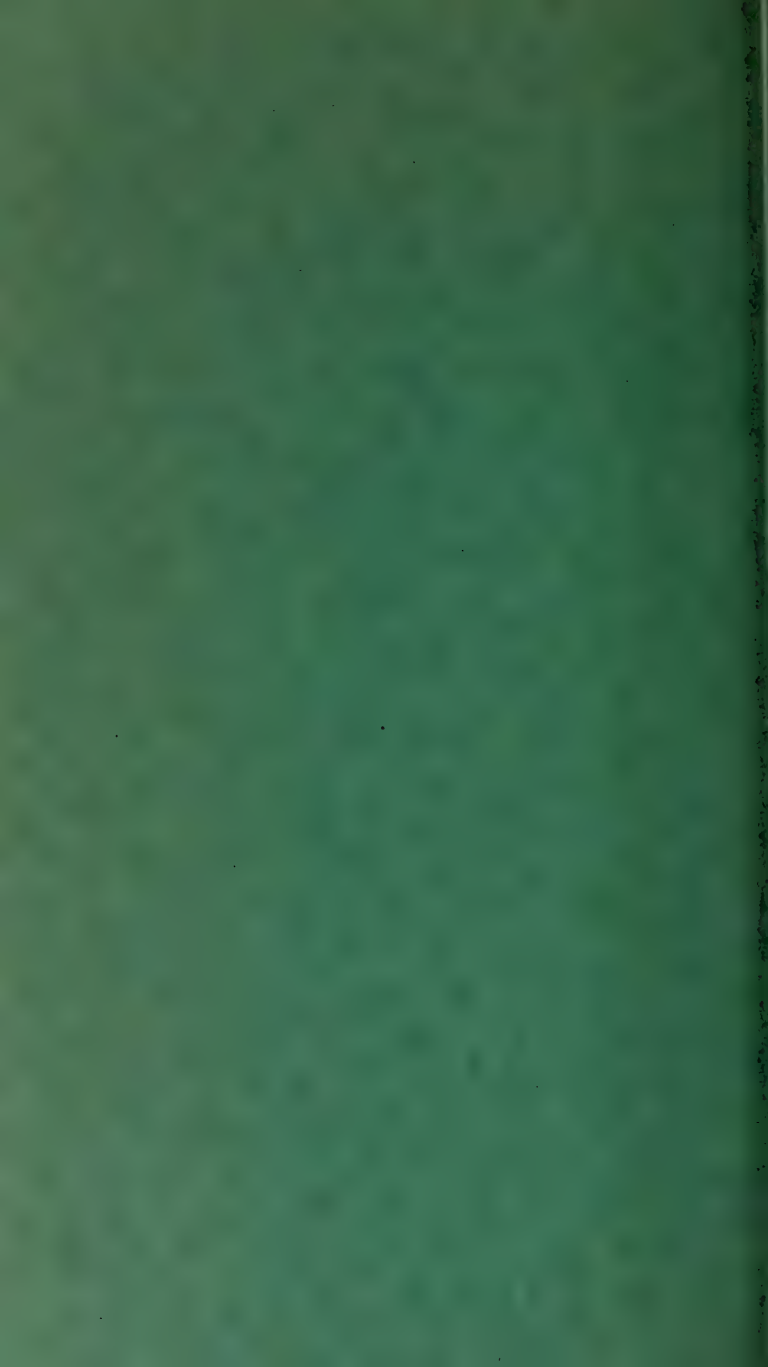
Appellee.

BRIEF FOR APPELLANT.

JOHN MOORE ROBINSON,
ROBERT M. HIMROD,

1030 Bank of America Building, Los Angeles 14,

Counsel for Appellant.



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No. 12588

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARGARET BRYAN SMITH,

Appellant,

vs.

HARRY C. WESTOVER, United States Collector of Internal
Revenue, Sixth Collection District of California,

Appellee.

BRIEF FOR APPELLANT.

Opinion Below.

An opinion in this case was handed down by the District Court of the United States for the Southern District of California, Central Division, by Hall, J., which is set forth in the record on appeal. [R. 95-101.] Findings of Fact and Conclusion of Law were filed by the Court [R. 102-104], and Judgment was entered in favor of Appellee (defendant below). [R. 105-106.] The case is reported at 89 Fed. Supp. 432 (D. C. Calif., 1950).

Jurisdiction.

This appeal involves Federal income taxes, and is taken from a Decision and Judgment by the United States District Court, Southern District of California, Central Division, in favor of Appellee as United States Collector of Internal Revenue, Sixth Collection District of California. The taxes in dispute were paid to Appellee as follows [R. 9, 61]: \$5,364.98 on April 12, 1944, \$5,364.98 on June 1, 1944, \$5,364.98 on September 13, 1944 and \$6,929.15 on January 13, 1945, or a total payment on account of

Appellant's income tax for the year of 1944 in the amount of \$23,024.09. Appellant in her individual income tax return for the taxable year of 1944 reported gross income in the sum of \$45,086.99. Total tax liability reflected by federal return was \$22,388.23 resulting in overpayment as thereby disclosed in the sum of \$635.86. [R. 65.] Thereafter Appellee advised Appellant that computation of her alternative tax had reduced the total tax liability to \$22,083.53 thereby increasing the overpayment disclosed by her return to \$940.56, which overpayment was credited by Appellee to Appellant on her 1945 estimated tax. [R. 65.]

On May 6, 1946, Appellant filed a claim for refund in the amount of \$14,510.27 with the Commissioner of Internal Revenue of the United States by filing her claim with Appellee as Collector, for said Commissioner in the manner provided by the laws of the United States in that connection. [R. 10, 61, 65.] Said claim for refund was rejected by the Commissioner of Internal Revenue and notice of such rejection was transmitted to Appellant on December 23, 1947. [R. 65.] Within the time provided in Section 3772 of the Internal Revenue Code and on March 18, 1948, Appellant brought an action in the District Court of the United States for the Southern District of California, Central Division, for the recovery of a portion of the Federal income tax paid by Appellant for the taxable year 1944. [R. 3-58, 76-95.] Judgment in favor of Appellee was entered April 18, 1950. [R. 105-106.] The Jurisdiction of this Court is invoked under Sections 1291 and 1294 of the Federal Judicial Code (28 U. S. C. A. 1291, 1294). Within one month and on May 15, 1950, Notice of Appeal was filed, together with designation and contents of Record on Appeal. [R. 107, 108.]

Questions Presented.

Whether, when under the provisions of a Testamentary Trust net income received and derived from the Trust estate is to be retained by the Trustee and as and when received immediately added to the principal or corpus of said Trust and thereafter considered as principal of said Trust, payments to a beneficiary of said Trust of 5 per cent of said principal or corpus are to be considered for Federal Income tax purposes as distribution of portions of said principal or corpus to said beneficiary.

United States Constitution, Amendment XVI.

“The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”

Internal Revenue Code, Sec. 162(b)(c) and (d)(1) provide:

“(b) There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the legatees, heirs, or beneficiaries, but the amount so allowed as a deduction shall be included in computing the net income of the legatees, heirs, or beneficiaries whether distributed to them or not. As used in this subsection, ‘income which is to be distributed currently’ includes income for the taxable year of the estate or trust which, within the taxable year, becomes payable to the legatee, heir, or beneficiary. Any amount allowed as a deduction under this paragraph shall not be allowed as a deduction under subsection (c) of this section in the same or any succeeding taxable year;

“(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir or beneficiary;”

“(d) *Rules for Application of Subsections (b) and (c).*—For the purposes of subsections (b) and (c)—

“(1) *Amounts distributable out of income or corpus.*—In cases where the amount paid, credited, or to be distributed can be paid, credited, or distributed out of other than income, the amount paid, credited, or to be distributed (except under a gift, bequest, devise, or inheritance not to be paid, credited, or distributed at intervals) during the taxable year of the estate or trust shall be considered as income of the estate or trust which is paid, credited, or to be distributed if the aggregate of such amounts so paid, credited, or to be distributed does not exceed the distributable income of the estate or trust for its taxable year. If the aggregate of such amounts so paid, credited, or to be distributed during the taxable year of the estate or trust in such cases exceeds the distributable income of the estate or trust for its taxable year, the amount so paid, credited, or to be distributed to any legatee, heir, or beneficiary shall be considered income of the estate or trust for its taxable year which is paid, credited, or to be distributed in an

amount which bears the same ratio to the amount of such distributable income as the amount so paid, credited, or to be distributed to the legatee, heir, or beneficiary bears to the aggregate of such amounts so paid, credited, or to be distributed to legatees, heirs, and beneficiaries for the taxable year of the estate or trust. For the purposes of this paragraph 'distributable income' means either (A) the net income of the estate or trust computed with the deductions allowed under subsections (b) and (c) in cases to which this paragraph does not apply, or (B) the income of the estate or trust minus the deductions provided in subsections (b) and (c) in cases to which this paragraph does not apply, whichever is the greater. In computing such distributable income the deductions under subsections (b) and (c) shall be determined without the application of paragraph (2)."

Internal Revenue Code, Sec. 22(b)(3):

"(b) EXCLUSIONS FROM GROSS INCOME.—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

"(3) GIFTS, BEQUESTS, DEVISES, AND INHERITANCES.—The value of the property acquired by gift, bequest devise, or inheritance. There shall not be excluded from gross income under this paragraph, the income from such property, or, in case the gift, bequest, devise, or inheritance is of income from property, the amount of such income. For the purposes of this paragraph, if, under the terms of the gift, bequest, devise, or inheritance, payment, crediting, or distribution thereof is to be made at intervals, to the extent that it is paid or credited or to be distributed out of income from property, it shall be considered a gift, bequest, devise, or inheritance of income from property;"

Statutes and Regulations Involved.

Treasury Regulation 111, Sec. 29.162-2 provides in part:

“Amounts distributable out of income or corpus—
Sec. 162(d)(1).

“(a) *Allocation among annuitants.*—Section 162 (d) (1) applies to all cases in which the executor or trustee can or must (for example, by the terms of the trust instrument or will) pay the whole or any part of a gift, bequest, devise, or inheritance out of other than income, except that no income is to be allocated under it to a legatee, heir, or beneficiary of a lump sum gift, bequest, devise or inheritance. It applies in all cases of annuities where any deficiency in the amount to be paid can be made up by a payment out of corpus of the trust. It also applies in cases where amounts are to be paid or credited at intervals and the executor or trustee has discretion whether to pay or credit such amounts out of income or corpus, regardless of the source (income or corpus) to which the executor or trustee attributes such amount. If an annuity is paid, credited, or to be distributed tax-free, that is, under a provision whereby the executor or trustee will pay the income tax of the annuitant resulting from the receipt of the annuity, the payment of or for the tax by the executor or trustee will be income to the annuitant under the rules of section 162(d) to the extent such payment is treated thereunder as out of income.

“The method of allocating income of the estate or trust for its taxable year in cases to which section

162(d)(1) applies is as follows: The aggregate of all amounts which can be paid, credited, or distributed out of other than income (except under a gift, bequest, devise, or inheritance not to be paid, credited, or to be distributed at intervals) is obtained. The aggregate of such amounts is considered to be paid, credited, or distributed in such cases out of income of the estate or trust for its taxable year if it does not exceed the distributable income of the estate or trust for its taxable year. If the aggregate of such amounts does exceed the distributable income of the estate or trust for its taxable year, the portion of such amount paid, credited, or to be distributed to a legatee or beneficiary is considered income of the estate or trust for its taxable year which is paid, credited, or to be distributed in an amount which bears the same ratio to the amount of all distributable income as the amounts so paid, credited, or to be distributed to the legatee or beneficiary bears to the aggregate of such amounts so paid, credited, or to be distributed to such legatees or beneficiaries for the taxable year of the estate or trust. The proportion stated in the preceding sentence applies only to legatees or beneficiaries of amounts which can be paid, credited, or distributed out of other than income of the estate or trust and, in computing such proportion, the amount of any gift, bequest, devise, or inheritance not to be paid, credited, or distributed at intervals is not to be included."

California Civil Code, Sec. 2220. "A trust in relation to real and personal property, or either of them, may be created for any purpose or purposes for which a contract may be made."

California Civil Code, Sec. 1559: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it."

California Civil Code, Sec. 863. "Except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust."

California Probate Code, Sec. 163. "The provisions of this chapter are in all cases to be controlled by a testator's express intention."

California Probate Code, Sec. 161:

"Legacies are distinguished and designated, according to their nature, as follows: . . .

"(3) An annuity is a bequest of certain specified sums periodically; if the fund or property out of which a demonstrative legacy or an annuity is payable fails, in whole or in part, resort may be had to the general assets, as in case of a general legacy; . . ."

Statement of the Case.

The case was tried on the allegations in Appellant's complaint that were admitted, together with a stipulation of facts entered into by the parties. [R. 63-74.] It was further stipulated [R. 75] that the Order of the Superior Court of the State of California, in and for the County of Los Angeles, in Proceedings No. 179740, was the Order for Final Distribution of the estate of John B. Bryan distributing the estate (after certain specific distributions) to Margaret Bryan Smith and the Security-First National Bank of Los Angeles, a National Banking Association, as Trustees. Said Order defined the uses and purposes for which said trust estate was to be held in trust and set forth the terms of said trust. [R. 76-95.]

Said Decree of Distribution in referring to Article VII of the Last Will and Testament of the said John B. Bryan, deceased, provides as follows [R. 85-86]:

"ARTICLE VII (of Will).

"Definition of Net Income: From the gross income received and derived from the trust properties and/or from the principal thereof, if the Trustees deem that necessary, said Trustees shall first fully pay and discharge any and all taxes, assessments (both general and special), including governmental charges and costs, attorney's fees, expenses and liabilities incurred by them as such Trustees, or to which they may be entitled or which they may incur in connection with the care, administration, management, protection, preservation or distribution of said trust property, including a reasonable compensation to said Trustee for their services as Trustees hereunder. The remaining income shall be net income, withheld, accumulated or payable as follows:

“(a) The net income received and derived from the trust estate shall be by said Trustees, during the natural life of his daughter, Margaret Bryan Smith, retained by them and as and when received immediately added to the principal or corpus of said trust and thereafter such income and profits shall be considered as principal of said trust.

“(b) Said Trustees, beginning from the date of the distribution of the estate to them as Trustees, shall pay each year in convenient installments, monthly if possible, to his said daughter, Margaret Bryan Smith, during the term of her natural life, five per cent (5%) of the fair market value of the corpus of said trust. In determining the fair market value of the corpus of said trust and the percentage thereof herein directed to be paid to his said daughter, the said Trustees yearly on the anniversary date of his death shall cause to have the then trust corpus appraised by a banking institution or trust company in the County of Los Angeles, and for the year immediately following shall accept this said appraisal and pay to his said daughter five per cent (5%) thereof for each respective annual period. Upon the unanimous consent of the Trustees the Corporate Trustee may act as the Appraiser.” [R. 85-86.]

John B. Bryan, died on September 18, 1938, a resident of the State of California, leaving a Will which was duly admitted to Probate on October 13, 1938, in Proceeding No. 179740, in the Superior Court of the State of California in and for the County of Los Angeles. Said Will contained among other provisions the Article VII quoted in part just above. On January 13, 1944, said Court sitting in Probate settled the Sixth and Final Account of the Executor's of said Will and made its Order and De-

cree directing a Final Distribution of the estate of the said John B. Bryan, deceased. [R. 63.] Net assets were by said Order distributed to Margaret Bryan Smith and the Security-First National Bank of Los Angeles, a National Banking Association as Trustees upon the trust set forth in said Last Will of John B. Bryan, deceased. The sum distributed amounted to \$452,698.89. Appellant Margaret Bryan Smith is the beneficiary of said Trust as well as one of the trustees and is the daughter of John B. Bryan, the decedent. [R. 64.]

During the taxable year of 1944 the trust received net income after deductions in the sum of \$24,348.14. [R. 64.] During the taxable year 1944 the trust commenced operations with the sum of \$5,882.28 in cash, the accumulated income in the sum of \$17,112.09 having been paid over to plaintiff. [R. 67.] Thereafter additional principal in the sum of \$94.40 was distributed into the trust and the refund of federal estate tax principal was received in the sum of \$5,305.52. [R. 67-69.]

A fiduciary income tax return was filed by the co-trustees of the John B. Bryan Trust with the Collector of Internal Revenue for the Sixth Collection District of California for the taxable year 1944 which reported a total income of the trust in the sum of \$26,663.91. There was shown thereon deductions for trust expenses in the sum of \$2,315.77 leaving a balance of \$24,348.14. [R. 64.] The sum of \$18,356.36 was distributed to Appellant during the year of 1944 and the Trustees claimed the payment of this amount as a deduction in computing net income of the trust taxable to the fiduciary. Appellant in her individual income tax for 1944 reported gross income in the sum of \$45,086.99 including said sum of \$18,356.36, paid to Appellant during the year 1944. [R. 64-65.] The tax lia-

bility claimed by the Collector amounted to \$22,083.53, of which Appellant claimed that \$14,510.27 represented an overpayment caused by the inclusion of the sum \$18,356.36 in Appellant's individual tax return for the taxable year 1944. A claim for refund was filed on May 6, 1946, for said sum of \$14,510.27 which was rejected on December 23, 1947. Thereafter the action in the District Court followed which was commenced on March 18, 1948, by Appellant. It was stipulated Appellant is the owner and holder of said claim for refund. [R. 65-66.]

The Trust commenced operations with \$5,882.28 of cash in its principal account from which payments were made from time to time and the principal account was finally replenished on July 13, 1944, when \$10,000.00 was transferred from the income account to principal, prior to this there had been certain small payments to principal and one large principal receipt in the amount of \$5,305.52 representing principal of a refund of federal estate tax.

The case was tried on the complaint insofar as the allegations were admitted with the exhibits attached thereto as amended together with a stipulation of facts including a financial account of the 1944 activities of the trust. It is not disputed and it appears clearly from the said account [R. 67-75], that it was the custom of the trustee in accordance with the directions of ARTICLE VII of the John B. Bryan Will to make the payments of 5 per cent of the corpus per annum, made on a monthly basis, out of accumulated principal cash on hand. When such principal cash had been virtually exhausted the trustee took a large portion of the accumulated income and added it to and comingled with corpus of the trust. As stated in the opinion and in the stipulation [R. 64] the trustees in accordance with the provisions of ARTICLE VII of the John B.

Bryan Will, annually valued the trust and made monthly payments therefrom equivalent to 5 per cent of the fair market value of said trust without reference to whether income had or had not been received.

Statement of Points to Be Urged.

1. The interpretation and application of Section 162(d) (1) of the Internal Revenue Code is unconstitutional in the instant situation for the reason that the constitutional power given by the Sixteenth Amendment applies only to income, and Appellant had no income from the trust.

2. The law of California, which governs the meaning and validity of the trust and the character and the validity of the interest of the beneficiary, is clear that the beneficiary has no interest in the corpus or income of the trust and has only a personal action against the trustee to compel performance of the trust provisions. Trust and beneficiary are each separate taxpayers. Interpretation of the intent of the trustor is governed by State law and the Commissioner of Internal Revenue is bound thereby. Such intent was clearly to apportion and pay out the corpus over a period of years, and such intent is controlling.

3. No income of the trust was distributed to Appellant but a portion of the trust corpus was set aside and distributed to Appellant. Once income from a trust is added to the corpus and comingled therewith such income although income to the trust when received thereupon ceases to be income and is thereafter an indistinguishable part of the trust corpus. Thus the trust should have paid the tax on the income it received for the year in which it was received. Appellant received distributions of 5 per cent of the corpus annually as a legatee and devisee and not as a recipient of income.

ARGUMENT.

Summary of Argument.

As the Commissioner of Internal Revenue attempts to apply Section 162(d)(1), such application is unconstitutional. The section itself if confined strictly to where payments are made of trust income to a beneficiary may be constitutional. Where such a section is applied constitutionally it provides a method of apportionment where a trust provides for the payment of sums out of income and provides for the invasion of corpus to insure full payment. No authorization of the Sixteenth Amendment is given for the particular tax here levied and to save the constitutionality of the statute it should be interpreted so as not to include payments made here to Appellant. The trust provides that income as received is to become part of the principal and this to be added to the principal on hand. No right whatever is given to Appellant to receive income and she is limited to the payment to her of five percent of the corpus annually.

The Commissioner of Internal Revenue was bound according to the laws, as set forth by the United States Supreme Court, to give effect to State law as it concerns the trustor's intent and the meaning, and the validity of the trust. The Commissioner is bound by the code of the State of California in dealing with the character and validity of the interest of the beneficiary in the trust. The beneficiary has no interest in the trust or its income and has merely the right to compel the trustee to follow the trust provisions to have the trustor apportion the corpus, and to pay out segments thereof over a period of years. This is controlling on the Commissioner.

It is clearly shown by the evidence that the trust added income to the corpus from time to time and accumulated such income, rather than paying it out to the beneficiary. The first payments were made from the principal cash on hand in excess of \$10,000.00 and the balance of the payments were made from principal cash after it had previously been replenished and added to from trust income. Thus the Appellant received an indistinguishable part of trust corpus and the trustees should have paid tax on all of the income they received. The Appellant received distributions of five per cent of the corpus annually as a legatee, and devisee and not as a recipient of income.

POINT I.

The Section (I. R. C., Sec. 162(d)(1)) and the Regulations as Attempted to Be Applied Here Are Being Applied Unconstitutionally.

Conceding that the statute here involved may appear to be valid on its face, to have a reasonable relation to the ends sought to be subserved, and to run counter to no positive constitutional interdictions, nevertheless, if it is applied in a particular manner to a certain set of facts, such application may be unconstitutional. This was settled long ago, and the case of *Yick Wo v. Hopkins*, 118 U. S. 356 (1886), is a leading example of such a holding. This case concerned the denial by the municipal authorities of the City of San Francisco of equal protection of the laws to petitioner therein. Such authorities were engaged in an unfair and discriminatory administration of a city ordinance which was apparently valid on its face. Such unfairness and discrimination was held to be violative of the Fourteenth Amendment of the United States

Constitution as a denial of equal protection of the laws to the petitioner.

It is self-evident that the only constitutional authorities that the Commissioner of Internal Revenue can proceed under in levying this tax against Appellant, is from the power given to the Congress of the United States by the Sixteenth Amendment to the Constitution. Thus the Congress is given power to levy taxes on the recipient of income without limitation as to the source of that income. Nevertheless the derivation of income by an individual is an absolute condition precedent to the levy of the tax. If we proceed from the axiomatic proposition that Congress neither intended a capital levy nor an excise tax when it amended a portion of the Internal Revenue Code relating to income tax, it must be seen that it is incumbent upon the Commissioner in order to justify his levy to show that in some way the Appellant received income rather than a portion of corpus by inheritance.

The case of *Irwin v. Gavit*, 268 U. S. 161 (1925), established the rule, although there was strong dissent in the Court and elsewhere at the time, that income from a testamentary life estate is held taxable notwithstanding that an equivalent sum acquired outright by bequest, devise or inheritance is exempt from tax. The Court said at page 168:

“But the distinction between the cases put of a gift from the corpus of the estate payable in installments, and the present, seems to us not hard to draw, assuming that the gift supposed would not be income.

This is a gift from the income of a very large fund, as income. It seems to us immaterial that the same amounts might receive different color from their source. We are of the opinion that quarterly payments, which it was hoped would last for fifteen years, from the income of an estate intended for the plaintiff's child, must be regarded as income within the meaning of the Constitution and the law."

This distinction was enacted in the statute in the very first Income Tax Act (1913 Act, Sec. II, B), and is now expressed in I. R. C., Sec. 22(b)(3), which provides in part in defining gross income:

"(b) *Exclusions from Gross Income.*—The following items shall not be included in gross income and shall be exempt from taxation under this chapter:

. . .

"(3) *Gifts, bequests, devises and inheritances.*—The value of the property acquired by gift, bequest, devise, or inheritance . . . if, under the terms of the gift, bequest, devise, or inheritance, payment, crediting, or distribution thereof is to be made at intervals, to the extent that it is paid or credited or to be distributed out of income from property, it shall be considered a gift, bequest, devise, or inheritance of income from property;"

It is therefore self-evident that the Congress has in the enactment of the Internal Revenue Code strictly followed the injunctions and authorizations of the Sixteenth Amendment to the United States Constitution, has been

very careful to tax only the receipts of income to the recipient, and has expressed itself in positive language to the effect that a receipt of property by gift, bequest, devise or inheritance is not taxable as income.

The distinction is pointed up even more saliently when it is noted that the same Internal Revenue Code contains numerous provisions dealing with estate and gift taxes and laying a tax upon the event of the receipt of a gift, or a receipt of a bequest, devise or an inheritance upon the distribution of an estate.

Following this case the cases of *Burnet v. Whitehouse*, 283 U. S. 148 (1930); *Helvering v. Pardee*, 290 U. S. 365 (1933); and *Helvering v. Butterworth*, 290 U. S. 365 (1933); established a clear rule of law concerning annual income and gifts of fixed sums certain for a period of years or for the life of the recipient. The distinction was thus made between a pure gift of income, which following the rule of *Irwin v. Gavit*, 268 U. S. 161, *supra*, was taxable to the recipient. The rule was further established, however, that in the event that it was decided that the trust provisions called for payments in all events, even though corpus might have to be invaded, then the whole of such payment was treated as if it were corpus and was not taxed as income to the recipient. The *Burnet v. Whitehouse* case, 283 U. S. 148 (1930), held that the recipient did not have to pay income tax on receipts of a payment certain and the correlative case of *Helvering v. Pardee*, 290 U. S. 365 (1933), stated that the trustee

could not deduct such payments made to a beneficiary even though from income. Payments purely from corpus were of course not taxable to the recipient. It is earnestly submitted by Appellant herein that the effect of the addition of I. R. C. Section 162(d)(1) was merely to change the rule with respect to the intermediate situation where corpus might or might not have to be invaded to make a periodic payment certain. Prior to the enactment of this statute even though corpus was never invaded nevertheless the receipt was not taxable to the recipient but the trust paid a tax on all of its income received without any deduction for payments to a beneficiary. No sound reason exists why in the instant case it should be construed that the burden of the income tax should be shifted from one tax paying entity, to-wit: the trust, to another, to-wit: the beneficiary. The Finance Committee was dealing strictly with these payments of income and in enacting the statute provided that if any particular payment contained a portion of corpus as well as income then the income tax should only be levied on the portion of such payment that actually represented income. (Senate Finance Committee Report No. 1631; Seventy-seventh Congress, Second Session, pp. 59-60.)

Clearly to avoid declaring Section 162(d)(1) of the Internal Revenue Code unconstitutional care must be taken by the courts to adopt that interpretation of the statutes which will avoid the raising of the constitutionality of it. (*Crowell v. Benson*, 285 U. S. 22, 62.)

POINT II.

The Law of the State of California Governs the Interpretation of This Trust and the Commissioner Must Take These Definitions as He Finds Them and Cannot Independently Determine Questions of State Law.

In effect Appellee here is contending that the Commissioner of Internal Revenue has the right to make an independent determination of the State law and to interpret the provisions of the trust so that certain portions thereof and certain payments thereof will be called income rather than corpus although the State law is very clear in defining the trust terms in a contrary manner. (*Blair v. Commissioner*, 300 U. S. 510; *Freuler v. Helvering*, 291 U. S. 35, 44.) The Court said, at pages 9 to 10, in *Blair v. Commissioner*:

“The donor was a resident of Illinois and his disposition of the property in that State was subject to its law. By that law the character of the trust, the nature and extent of the interest of the beneficiary, and the power of the beneficiary to assign that interest in whole or in part, are to be determined.”

A trust agreement in California in which the trustor conveys property to a third party who acts as trustee upon the promise of that party to convey such property to a third party in periodic installments is a valid trust in California and also is a contract for the benefit of a third party. In California contracts for the benefit of third

parties are valid and such transfer can be made in trust as well as absolutely. (California Civ. Code, Secs. 2220, 1559; *Estate of Reith*, 144 Cal. 314; *Pacific Ventura Corporation v. Huey*, 15 Cal. 2d 711, 718.) The trust and beneficiary are under the law of California separate entities (California Civ. Code, Sec. 863), and the action possible to a beneficiary is restricted to the enforcement by such beneficiary in appropriate equitable action of the duties of said trustee as defined by the laws of the State of California and by the trust instrument establishing the trust. (*Estate of Fair*, 132 Cal. 523; *Anglo-California Bank v. Kidd*, 58 Cal. App. 2d 651, 654.) The trust and the beneficiary are separate entities and are also recognized by Federal law to be separate taxpayers. (See *Anderson v. Wilson*, 289 U. S. 20, 27.)

It is also clear that the California law follows the Federal law and agrees with it in respect to the long standing difference between income beneficiaries and annuitants. Even if it can be conceded for argument that the status of annuitants whose whole annuity is paid out of income has been changed by the additions to I. R. C. Section 162, nevertheless we are concerned here with an apportionment of corpus and the payment by the trustee to the beneficiary of 5 per cent thereof annually.

POINT III.

Appellant Is Not the Recipient of Income nor Is She an Income Beneficiary, but Merely Received a Portion of the Corpus.

From the evidence itself it clearly appears that the Appellant was never by the provisions of the trust entitled to receive any income therefrom whatsoever. She was given the right to receive specified portions of the funds at stated intervals, which merely amounted to a postponement of the actual enjoyment of that portion of the corpus set aside for her. [R. 85-88.] The account of the trust [R. 67-74] shows that the Appellant first received one-twelfth of five per cent of the value of the corpus and the succeeding monthly payments of one-twelfth thereof from principal cash on hand in the trust. Thereafter, certain small payments were received. On April 18, 1944, a refund of \$5,305.52 was received from the federal estate tax previously paid, which also became a part of the corpus. Payments continued to be made out of these funds until the income had accumulated and had been transferred to the principal which was done on July 13, 1944, in the amount of \$10,000.00. This sum thereupon became an indistinguishable portion of the corpus and was completely comingled therewith. Therefore, it was as much a part of the principal cash as any other portion thereof and was indistinguishable from the rest of the corpus.

It must be presumed that the trustees followed the provisions of the trust in connection with the accumulation of income and transferred it to corpus. It is quite clear from the record [R. 67-74] that the trustees did actually follow the provisions of the trust insofar as possible here.

The trustees did not pay out income received by them but did in fact add such income to the trust corpus where it became an indistinguishable portion of the cash and securities comprising such corpus.

The only payments from the income were for trustees' fees except for the transfer of income into the corpus and two small payments of \$6.90 and \$9.13, respectively, for personal property tax and additional interest on federal income tax. [R. 70-72.]

Conclusions.

In conclusion it is submitted that the Court erred:

FIRST: In holding that I. R. C. Section 162(d)(1) applies to Appellant and that such application was not unconstitutional.

TWO: In not recognizing that the law of California governs and that the Commissioner is bound thereby and cannot treat that portion of the corpus as income to the Appellant.

THIRD: In refusing to recognize that the Appellant received corpus distribution, and not income distribution, and that the income of the trust had been indistinguishably conveyed to the corpus.

It is submitted that the decision of the Court below is erroneous and that said decision should have been that Appellant was entitled to a refund of the money claimed together with interest as provided by law.

Respectfully submitted,

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No. 12588

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARGARET BRYAN SMITH,

Appellant,

vs.

HARRY C. WESTOVER, United States Collector of Internal
Revenue, Sixth Collection District of California,

Appellee.

Appeal from the United States District Court for the
for the Southern District of California,

BRIEF FOR THE APPELLEE.

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No. 12588

IN THE

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MARGARET BRYAN SMITH,

Appellant,

vs.

HARRY C. WESTOVER, United States Collector of Internal
Revenue, Sixth Collection District of California,

Appellee.

BRIEF FOR THE APPELLEE.

Opinion Below.

The District Court made findings of fact and conclusions of law. [R. 102-104.] Its memorandum opinion [R. 95-101] is reported at 89 Fed. Supp. 432.

Jurisdiction.

This appeal involves federal income taxes for the calendar year 1944 in the amount of \$14,510.27, plus interest. The taxes in controversy were paid to the Collector on various dates between April 12, 1944, and January 13, 1945. [R. 9, 61.] Taxpayer filed a claim for refund on May 6, 1946, which was denied by the Commissioner of Internal Revenue and notice of such denial was transmitted to the taxpayer on December 23, 1947. [R. 65.]

Within the time provided in Section 3772 of the Internal Revenue Code and on March 18, 1948, the taxpayer brought an action in the District Court of the United States for the Southern District of California, Central Division, for the recovery of a portion of the federal income tax paid by the taxpayer for the taxable year 1944. [R. 66.] Jurisdiction was conferred on the District Court by 28 U. S. C., Section 1340. Judgment was entered for the Collector on April 18, 1950. [R. 105-106.] Within sixty days and on May 15, 1950, a notice of appeal was filed. [R. 107.] The jurisdiction of this Court is invoked under 28 U. S. C., Section 1291.

Questions Presented.

1. Taxpayer, who was the life beneficiary of a testamentary trust created by her father, was entitled to receive each year an amount equal to five percent of the fair market value of the corpus of the trust. Income of the trust was to be added to corpus for the life-time of the taxpayer. During the taxable year, the net income of the trust was \$24,348.14, and \$18,356.36, which was equivalent to five percent of the fair market value of the corpus of the trust, was paid to the taxpayer. Was the District Court correct in holding that the amount distributed to the taxpayer was income to the taxpayer under Section 162(b) and (d) of the Internal Revenue Code?

2. If the first question is answered in the affirmative, are those provisions in conflict with the Sixteenth Amendment of the Constitution?

Statutes and Other Authorities Involved.

These will be found in the Appendix, *infra*.

Statement.

The District Court found the facts as stipulated. [R. 102.] They may be summarized as follows:

Taxpayer's father, John B. Bryan, died testate on September 18, 1938. [R. 63.] His will, after provision for payment of debts, set up a residuary trust with taxpayer and the Security-First National Bank of Los Angeles [R. 51] as co-trustees. [R. 31-50.] The will defined "net income" as the gross income received from trust property less trust expenses and provided that such net income during taxpayer's life should be added to the trust corpus and thereafter be considered as principal of the trust. It was further provided that the co-trustees were to annually pay the taxpayer five percent of the fair market value of the corpus of the trust, in monthly payments if possible, based upon an annual appraisal of the trust corpus by a banking institution. [R. 41-42.]

In the taxable year 1944, the gross income of the trust was \$26,663.91. The net income of the trust after deductions was \$24,348.14. Payments totaling \$18,356.36 were made by the trustees to the taxpayer as beneficiary of the trust. In reporting the trust's income, the fiduciaries deducted \$18,356.36 as an income distribution paid to the beneficiary. Consistently, the taxpayer, in computing her individual income tax for the year 1944, included the \$18,356.36 as her income. [R. 64-65.]

Thereafter the taxpayer filed a claim for refund on the theory that the amount paid to her by the trust in 1944 was a bequest of principal and not a distribution of income. The claim was denied and an action was brought

in the District Court for the Southern District of California. [R. 65-66.] The District Court rendered judgment for the Collector, concluding that the \$18,356.36 paid to the taxpayer in 1944 by the trust fiduciaries was a distribution of income fully taxable to the taxpayer as the recipient. [R. 103.]

Summary of Argument.

1. Section 162(b) and (d)(1) of the Code, as amended in 1942, provides that distributions to beneficiaries of estates and trusts are taxable to the beneficiaries if they "can be paid * * * out of other than income" providing that the amounts distributed do not exceed the income of the estate or trust for that year. Since the trust had net income in excess of \$24,000 and only \$18,356.36 was distributed to the taxpayer, the direction of the testator that taxpayer was to be paid out of principal is ineffective to immunize her from tax on the unambiguous statutory provision. The contention that Section 162(d)(1) was inserted in the Code to deal only with the situation illustrated by *Burnet v. Whitehouse*, *infra*, where the annuity was to be paid out of income but corpus could be invaded if necessary, is refuted not only by the statute itself, but by decisions of this and other courts, by the legislative history and by the Regulations.

2. The contention that Section 162(d)(1) as interpreted below is unconstitutional is equally untenable.

First, the question is not even open here on the familiar principle that questions not raised below, particularly con-

stitutional questions, may not be availed of to overturn the decision of a trial court.

Second, if open the contention fails because it is based on untenable assumptions. One such assumption is that taxpayer received a gift of principal. This overlooks the substance of the situation which, on the authority of a long and undeviating line of Supreme Court decisions, is controlling when the constitutionality of income tax provisions is questioned. The taxpayer, as beneficiary, received in excess of \$18,000 which the testator labeled "corpus," but since the corpus, theoretically reduced by the distribution, was restored simultaneously by the transfer of "income" to it, it is plain that the trust's increment was paid to taxpayer. The contention that Congress is powerless to disregard the nomenclature and tax the trust income to its recipient is, then, not only in conflict with all the authorities, but is transparently without merit.

A second assumption, which need not be reached if we are correct in our analysis of the substance of the situation, is that a gift of principal is not constitutionally taxable to the recipient. The question in its full application has never been decided because Congress has generally exempted gifts from income tax, but no good reason has here been advanced and we think that there is none to prevent their taxation. Moreover, in situations analogous to this one, the tax has been upheld as against the attack that the taxpayer-donee was being taxed on a gift of principal.

ARGUMENT.

I.

The Distributions Received by the Taxpayer as Beneficiary of the Trust During the Taxable Year Were Income Taxable to Her Within the Meaning of Section 162(b) and (d)(1) of the Internal Revenue Code.

1. It was the original purpose of Sections 161 and 162 of the Internal Revenue Code, and their counterparts in the various Revenue Acts in effect prior to the adoption of the Code, to tax all income of estates or trusts either to the trust or to the beneficiary. (*Helvering v. Butterworth*, 290 U. S. 365; *cf. Freuler v. Helvering*, 291 U. S. 35.) Prior to the amendment to Sections 22(b)(3) and 162 made by Section 111 of the Revenue Act of 1942, c. 619, 56 Stat. 798, many difficult questions had arisen as to whether the beneficiary or the fiduciary was taxable on the income earned by the estate or trust. Because Section 22(b)(3) of the Code, prior to its amendment in 1942, specifically exempted the value of the property acquired by gift, devise, bequest or inheritance (except the income from such property), it was held that distributions out of income made by trustees to beneficiaries which, under the terms of the trust instrument, were to be made regardless of the sufficiency of the trust income, were not deductible by the trustees under Section 162, and hence the income was taxable to the trust and not to the beneficiaries. (*Burnet v. Whitehouse*, 283 U. S. 148; *Helvering v. Pardee*, 290 U. S. 365.)

In order to eliminate the problem of whether the distribution to the beneficiary was taxable to him when the trust actually had income equal to or in excess of the distribution of which the *Whitehouse* and *Pardee* cases were

illustrative of only one phase, Section 111 of the Revenue Act of 1942 was enacted to amend Section 22(b)(3) and Section 162 so that income of a trust or estate is taxed to the recipient beneficiary regardless of the nomenclature used to designate the source of payments to the beneficiary.¹

This case falls squarely within the precise language of Section 162(d)(1) of the Internal Revenue Code, Appendix, *infra*, which was added to the Code by the 1942 amendment, and it is a classical example of the problem with which the 1942 amendment was intended to cope. In 1944 the trust received net income of \$24,348.14 and the taxpayer received distributions from the trust of \$18,356.36. [R. 64.] Under the trust instrument, no other beneficiary was entitled to a distribution of income, and in fact none was distributed to any other beneficiary. The contention (Br. 22-23) that the \$18,356.36 was not income to the taxpayer because it was required by the terms of the trust to be paid out of principal is directly contrary to the purpose of the 1942 amendment as explained above, and to the plain language of that amendment. Thus, in the language of Section 162(d)(1), the payment of \$18,356.36 to the taxpayer in 1944 by the trustees is a case—

where the amount paid * * * out of other than income * * * during the taxable year of the estate or trust shall be considered as income of the estate or trust which is paid * * * if the aggregate of such amounts so paid * * * does not exceed the distributable income of the estate or trust for its taxable year.

¹Excluding, however, lump sum gifts which are not here involved.

Since it is undisputed that the distributable income of the trust was \$24,348.14 for the year 1944, the \$18,356.36 paid out of other than income, *i. e.*, principal, is the exact situation which Section 162(d)(1) describes.²

A problem similar to that involved here was before this Court in *Laughlin's Estate v. Commissioner*, 167 F. 2d 828. This Court there permitted a deduction to an estate of periodic payments made to the decedent's divorced wife pursuant to a property settlement incident to divorce. This Court pointed out (p. 830) that "Counsel for the Government conceded on oral argument that it is immaterial that the agreement between Homer [the decedent] and Ada Laughlin failed to require the \$9,600 to be paid out of income. Where the amount paid, credited or to be distributed can be paid, credited or distributed out of either income or corpus, it shall be considered as income of the estate or trust" provided the trust income is equal to or in excess of the distribution. That case was not a situation such as *Whitehouse* where payments were directed to be paid out of income and corpus was to be invaded only if income were inadequate but was a case where the payment was required to be made without designation of the source of the payment. It was, therefore, possible for the trustees to make the payment so far as the terms of the agreement were concerned completely out of corpus. Nevertheless, this Court correctly held (as

²This provision directs the result below because (1) Section 162(d), Appendix, *infra*, is entitled "Rules for Application of Subsections (b) and (c)", (2) Section 162(b), Appendix, *infra*, provides that the trust shall have a deduction for income "to be distributed currently * * * but the amount so allowed as a deduction shall be included in computing the net income of the * * * beneficiaries * * *," and (3) thus, Sections 162(b) and (d) read together expressly require that these distributions be taxed to the taxpayer as her income.

we there conceded, against our interest) that the estate could take the deduction which, of course, under Section 162(b) would require that the wife include the payment in her income. See also *Carlisle v. Commissioner*, 165 F. 2d 645 (C. A. 6th), where the court interpreted Section 162(b) of the Code, as amended by Section 111(b) of the Revenue Act of 1942, *supra*, to require that a capital gain be taxed to the beneficiary, notwithstanding that it was part of the corpus of the estate received as an inheritance under state law. These cases clearly establish that the source of the payment under the amendment to Section 162(b) is immaterial on the question whether the distribution is income in the hands of the beneficiary and fully support us here. They additionally show that the 1942 amendments to Section 162 were not limited to the *Whitehouse* situation as taxpayer contends. (Br. 19.)

Not only does the language of Section 162(d) literally cover the instant case and the decisions under it support our position, but there is no doubt that it directs a result fully contemplated both by the drafters of the statute and by those charged with its administration. S. Rep. No. 1631 on H. R. 7378, which became the Revenue Act of 1942, stated as follows with respect to Section 162(d) (1) (S. Rep. No. 1631, 77th Cong., 2d Sess., p. 72 (1942-2 Cum. Bull. 504, 560)):

Section 162(d)(1) applies to all cases in which the executor or trustee can or *must* (by the terms of the trust instrument or will) pay the whole or any part of a gift, bequest, devise, or inheritance out of other than income, except that no income is to be allocated under it to a legatee, heir, or beneficiary of a lump sum gift, bequest, devise, or inheritance. (*Italics supplied.*)

In the face of this language, taxpayer's contention that Section 162(d) was *intended* to deal only with the problem of *Burnet v. Whitehouse*, *supra*, and similar cases, is additionally untenable. The Senate Finance Committee Report in stating that Section 162(d)(1) applies to distributions which were required to be paid "out of other than income," *i. e.*, principal, when read with Section 162 (b) expressly covers this situation. The phrase "must * * * pay a whole or any part of a * * * devise out of other than income"³ is unequivocal.

Similarly, it is clear that the Treasury Department has always considered that Section 162(d)(1) applies to a distribution such as that involved here even though directed by the terms of the trust instrument to be paid out of principal. Thus, Section 29.162-2, Treasury Regulations 111, Appendix, *infra*, provides that "Section 162 (d)(1) applies to all cases in which the executor or trustee can or must (for example, by the terms of the trust instrument or will) pay the whole or any part of a gift, bequest, devise, or inheritance out of other than income * * *." Since the Regulation is in precise accord with the Committee Report and in any event does no more than give effect to the literal language of Section 162(d)(1),

³The conclusion directed by the statutory language and the Finance Committee Report that the intended scope of Section 162(d) was not only that of the problem of the *Whitehouse* case is also confirmed by the fact that the House Bill (H. R. 7378, Section 110) which, according to the Report of the Ways and Means Committee (H. Rep. No. 2333, 77th Cong., 2d Sess., p. 1 (1942-2 Cum. Bull. 372, 407-408)), was limited as taxpayer suggests (Br. 18-19) was completely revised in the Senate draft (H. R. 7378, Section 111) where the provision in Section 162(d)(1) upon which we rely was added and which as explained in that portion of the Senate Report quoted above, was intended to cover the exact situation involved here.

there can be no doubt that the Regulation is in accord with the statute. Even if this were less clear, the Regulation should be highly persuasive of the correctness of the decision below under the familiar principle, as expressed by the Supreme Court in *Commissioner v. South Texas Co.*, 333 U. S. 496, 501:

This Court has many times declared that Treasury regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes and that they constitute contemporaneous constructions by those charged with administration of these statutes which should not be overruled except for weighty reasons. See, *e. g.*, *Fawcus Machine Co. v. United States*, 282 U. S. 375, 378.

Counsel make no attempt to reconcile their contention with the language of the Committee Report, the statute and the Regulations as indeed they cannot.

2. In a confused argument counsel contend (Br. 20-21) that the effect of our position here is that the Commissioner of Internal Revenue has taken upon himself to declare the state law at variance with controlling decisions of the State of California which are binding for federal tax purposes. The short answer is that the Commissioner has made no determination of state law either in accord with, or contrary to, decisions announced by the Supreme Court of California, because the law of California is not relevant to the present inquiry.

Taxpayer's position is contrary to the settled principle that federal revenue laws are to be construed in light

of the general purpose to establish a nationwide scheme of taxation uniform in its taxation. "Congress establishes its own criteria *and the state law may control only when the federal taxing act by express language or necessary implication makes its operation dependent upon state law.*" (Italics supplied.) (*Lyeth v. Hoey*, 305 U. S. 188, 194. In accord: *Burnet v. Harmel*, 287 U. S. 103, 110; *Palmer v. Bender*, 287 U. S. 551, 555; *United States v. Pelzer*, 312 U. S. 399, 402; *Estate of Putnam v. Commissioner*, 324 U. S. 393.)

In *Lyeth v. Hoey*, *supra*, an heir had received a sum in settlement in litigation of a will. The taxability of that sum under the state statute depended upon the meaning of the statutory exemption, "acquired by inheritance." The law of the testator's domicile held that sums paid as will compromises were not inheritances. Acting on the principle that in the interest of uniformity exemptions under federal statutes should be determined by federal courts, the Supreme Court reached a contrary federal rule. The present situation is an *a fortiori* one because there is no provision of Section 162(d) the definition of which varies under the state law from what it would under the federal law. The statute unambiguously taxes to the recipient distributions which can or must be made out of other than income. The taxpayer's contention, then, is based on the patent fallacy that state law concepts developed in unrelated contexts are binding in the interpretation of the Internal Revenue Code even when Congress has plainly intended a uniform and contrary federal result.

II.

Section 162(d)(1) of the Code Is Constitutional.

1. Taxpayer contends (Br. 15-19) that Section 162(d)(1), as interpreted by the court below, conflicts with the Sixteenth Amendment, Appendix, *infra*. The contention is utterly without merit and there is real doubt whether taxpayer should even be heard here on that contention. The court below stated [R. 99] that "The constitutionality of that Section [Section 162(d)] is not challenged by the plaintiff." Although taxpayer's complaint [R. 3-13] purports to raise the constitutional issue, the court below apparently considered that the contention had been abandoned since it appears that it was not otherwise referred to before that court. In view of the unequivocal statement of the court below that the constitutionality of Section 162(d) had not been challenged, the failure of the taxpayer to move for rehearing or otherwise to object to that statement is at least indicative of the taxpayer's agreement that such was the fact. Accordingly, the firmly entrenched principle that an appellate court will not consider grounds for reversal not presented to the tribunal below, particularly as to constitutional questions, is fully applicable. (*Shahmoon v. Commissioner*, 185 F. 2d 384 (Cal. App. 2d); *Pacific Mut. Life Ins. Co. of California v. Barton*, 50 F. 2d 362, 367 (Cal. App. 5th), certiorari denied, 284 U. S. 647; *Wabash Ry. Co. v. City of St. Louis*, 64 F. 2d 921, 929 (Cal. App. 8th), certiorari denied, 290 U. S. 668, and cases there cited.

2. The Sixteenth Amendment to the Constitution grants the power to Congress to tax income without apportionment. Taxpayer's contention (Br. 15-19) that Section 162(d)(1) as interpreted by the court below is

unconstitutional proceeds on the untenable assumption that Congress is bound by the nomenclature of the parties in exercising its power under the Sixteenth Amendment to tax "income." Actually, this assumption by taxpayer's counsel violates perhaps the most firmly established and most fundamental principle that has evolved in the interpretation of the revenue laws. It was announced in the earliest decisions after the adoption of the Sixteenth Amendment as stated in *United States v. Phellis*, 257 U. S. 156, 168, that—

We recognize the importance of regarding matters of substance and disregarding forms in applying the provisions of the Sixteenth Amendment and income tax laws enacted thereunder. In a number of cases besides those just cited we have under varying conditions followed the rule. *Lynch v. Turrish*, 247 U. S. 221; *Southern Pacific Co. v. Lowe*, 247 U. S. 330; *Gulf Oil Corporation v. Lewellyn*, 248 U. S. 71.

It has been constantly adhered to since. (*Commissioner v. Sunnen*, 333 U. S. 591; *Helvering v. Clifford*, 309 U. S. 331; *Helvering v. Stuart*, 317 U. S. 154; *Harrison v. Schaffner*, 312 U. S. 579; *Douglas v. Willcuts*, 296 U. S. 1; *Corliss v. Bowers*, 281 U. S. 376; *Burnet v. Wells*, 289 U. S. 670; *Commissioner v. Court Holding Co.*, 324 U. S. 331; *Griffiths v. Commissioner*, 308 U. S. 355; *Gregory v. Helvering*, 293 U. S. 465; *Weiss v. Stearn*, 265 U. S. 242.

Looking at the realities of this situation, it is evident that the general plan of the decedent was to replenish any reductions of the trust corpus by reason of the distributions with the trust income "immediately" as income was received [R. 96]; thus his plan accomplished in a roundabout fashion what could have been done directly,

namely, adding income to corpus and distributing "corpus" instead of distributing income directly to the extent of five per cent of the corpus. As decedent's plan worked out in practice, there was never any invasion of "corpus" or distribution of "corpus" in the true sense of that term. The trust income in the tax year being greater than the amount distributed, there was at the end of the year an amount in "corpus" greater than that which was in existence at the beginning of the year. No matter how artful the choice of language in the trust instrument, the circumstance cannot be denied that the trust ended the year with more corpus than it started with, that is income over expenses (\$24,348.14) as such disappeared, and that the beneficiary received \$18,356.36.

The congressional direction that to the extent that such increment is distributed to a beneficiary it shall be considered as his income is a simple recognition, as applied to this case, of the realities and a direction to disregard the subterfuges by which the testator through the use of language sought to convert what in the normal meaning of the term was "income" into principal. Indeed, the very provision that the taxpayer was entitled to an amount equal to five per cent of the corpus was probably the testator's estimate of what the trust would earn. The taxpayer's receipt of the distributions from the trust each year had the same economic value to her whether called "income" or "principal" by the testator. And it is the receipt of that economic value or satisfaction on which the tax is levied.

Although an estate or trust on the one hand and a beneficiary on the other are separate taxpayers, it is not to be disputed that a trust is an abstraction and that the economic pinch must actually be felt by flesh and blood

persons. While it is true, as taxpayer contends (Br. 19), that the law has dealt with the abstraction for income tax purposes as having a separate existence (*cf. Anderson v. Wilson*, 289 U. S. 21), it certainly does not follow that Congress may not constitutionally either ignore the abstraction or treat it as a conduit and impose the tax upon those beneficially interested in the income (*cf. Corliss v. Bowers*, 281 U. S. 376).

The excellent opinion of the court below quotes from the opinion of Justice Cardozo in *Burnet v. Wells*, *supra*, page 675, where it is stated that "One can read in the revisions of the revenue acts the record of the Government's endeavor to keep pace with the fertility of invention whereby taxpayers had contrived to keep the larger benefits of ownership and be relieved of the attendant burdens." This case and this statute are a splendid illustration of Justice Cardozo's statement. The apt language of the court below, as follows, accurately and succinctly discloses the situation [R. 100]:

To *acceed* [*sic*] to the plaintiff's contention would be to not only disregard the plain intent of Congress, but also to misconstrue the language of the Statute. A provision in a will cannot change the character of the actual earnings of a trust estate after death of the testator under the Internal Revenue laws by simply changing the name of the earnings from income to corpus either upon the receipt of the earnings or at the time of an annual appraisal. As I read the Statute it comes to this; if there actually was income, and if any money was distributable, and the money distributable and distributed, was less than the income, then it was "distributable income" within the meaning of the Statute, and is taxable to the recipient.

In light of what we have said, it is apparent that taxpayer's principal reliance (Br. 19) for the statute's unconstitutionality that "No sound reason exists why in the instant case it should be construed that the burden of the income tax should be shifted from one tax paying entity, to-wit: the trust, to another, to-wit: the beneficiary" is without merit.⁴

3. We have pointed out thus far: (1) That no constitutional issue is properly before the court and (2) that in any event the constitutional contention is not well founded because it is based on the unsupported assumption contrary to all the authority that Congress has no power to deal with the obvious device disclosed by this record which, by choice of language, would immunize the recipient of recurrent payments of trust income from income tax. The contention that the statute is unconstitutional fails for yet another reason.

Assuming that we are incorrect in arguing as we have that what the taxpayer actually received was not a portion of corpus transferred at death rather than income from that corpus, taxpayer's second underlying assump-

⁴Actually taxpayer has no even superficially convincing argument for the statute's unconstitutionality. The argument is at best circular in that counsel merely assert that the statute is unconstitutional and use this assertion to base the contention that it should be construed otherwise than it was below, ignoring, as we pointed out in part I, *supra*, that the statute, its history and its administrative interpretation are so clear as to leave nothing that may properly be left to the field of "interpretation." Overlooked, completely, too, is the fundamental principle that a statute is presumed to be constitutional and all reasonable inferences must be drawn in favor of constitutionality. *United States v. Fox*, 95 U. S. 670; *Green v. Frazier*, 253 U. S. 233; *Madden v. Kentucky*, 309 U. S. 83. In sum, counsel's unconstitutionality contention is an unsupported assertion of unconstitutionality as a device to "interpret" the statute in a manner that is untenable.

tion that a gift of corpus may never be constitutionally treated as income to the recipient is reached. But that assumption is without support in any of the cases, and there is much by way of analogous authority which points to the opposite conclusion.

The question whether an outright gift may be constitutionally taxed to the donee has been a subject for theoretical discussion since the first days of the income tax statutes. Because gifts have been expressly exempted from income under Section 22(b)(3) of the Code and its counterparts in the various Revenue Acts, the question has never come before the courts. The inference which taxpayer draws from the exemption in Section 22(b)(3) (Br. 17-18) that Congress thought that it does not have the constitutional power to tax gifts is the opposite inference from that drawn by the courts and commentators. See, for example, the opinion of Judge L. Hand in *Rice v. Eisner*, 16 F. 2d 358, 360 (Cal. App. 2d), where it was stated that the provision of Section 22(b)(3) "shows that in the minds of those who drew the acts it was thought open to question whether even this might not be considered income." And see generally Magill's *Taxable Income* (Rev. ed.), chapter 11.⁵

⁵Taxpayer's reliance (Br. 16-17) on *Irwin v. Gavitt*, 268 U. S. 161, for the proposition that periodic sums acquired out of corpus are constitutionally exempt from tax is unsupported by that decision. The full opinion indicates that the Court was merely dealing with a hypothetical contention of taxpayer which assumed that gifts of corpus could not be taxed and the Court merely pointed out that it could distinguish the case before it of gifts of income from corpus (p. 168) "*assuming* that the gift supposed would not be income." (Italics supplied.)

But in any event, there is no question before this court as to whether outright periodic gifts of corpus could be constitutionally taxable as income since the tax here is levied on income which arose from the corpus after the date of decedent's death. Rather we have here the much narrower question, even on the assumption most favorable to taxpayer (that she received a gift of corpus), of whether Congress has the power to state, as between a trust and its beneficiaries, which shall be liable for the tax on income earned by the trust.

In situations that closely parallel the instant one, the Supreme Court has had no hesitancy in taxing to donees, or even to purchasers for value, the realized increment on the disposition of an asset that came into existence before the donees' or purchasers' acquisition of the asset. Thus in *Taft v. Bowers*, 278 U. S. 470, and in *Cooper v. United States*, 280 U. S. 490, the provision of the Revenue Acts was upheld that a donee is required to pay an income tax on the difference between the selling price of property received by gift and the value when the donor acquired the property notwithstanding that the entire appreciation in value may have taken place prior to the gift. The court expressly acknowledged that in one sense the donee was being taxed on a portion of a gift of property, but justified the result on various grounds including that it was necessary to prevent the escape of tax and that the donee was not being treated arbitrarily or unfairly. Similarly here, Congress must be deemed to have constitutional authority to prevent the compartmentalizing of in-

come to avoid surtax to those who have the beneficial interest in the trust income. And certainly there is nothing arbitrary or capricious about a result that would tax the distribution here involved as income to this taxpayer who actually received amounts less than the trust received as income.

Similarly, the Supreme Court has had no difficulty in justifying the constitutionality of provisions of the Revenue Acts which tax to purchasers of stock the full dividend paid on such stock notwithstanding that the price paid included a portion or even the full amount of the dividend. (*United States v. Phellis*, 257 U. S. 156.)

Finally, Section 162(d) in requiring all distributions to be taxed to the recipient, to the extent that the trust has income, precisely parallels the much older provision in Section 115(b) of the Code which creates an irrebuttable presumption that distributions by corporations are made out of earnings and profits "and from the most recently accumulated earnings and profits." Under that provision, a label by a corporation that a distribution is out of corpus would be of no avail. That there appear to be no cases where a taxpayer has even contended that the provision is unconstitutional strongly suggests that there is no merit in such a position and because of the closeness of the analogy between that section and Section 162(d) attests the unreasonableness of taxpayer's position here.

Conclusion.

The decision of the District Court is correct and should be affirmed.

Respectfully submitted,

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March, 1951.

APPENDIX.

United States Constitution, Amendment XVI.

The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.

Internal Revenue Code:

SUPPLEMENT E—ESTATES AND TRUSTS.

* * * * *

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * * * *

(b) [Amended by Sec. 111(b) of the Revenue Act of 1942, c. 619, 56 Stat. 798]. There shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year which is to be distributed currently by the fiduciary to the legatees, heirs, or beneficiaries, but the amount so allowed as a deduction shall be included in computing the net income of the legatees, heirs, or beneficiaries whether distributed to them or not. As used in this subsection, "income which is to be distributed currently" includes income for the taxable year of the estate or trust which, within the taxable year, becomes payable to the legatee, heir, or beneficiary.

* * *

* * * * *

(d) [added by Sec. 111(c) of the Revenue Act of 1942, *supra*] *Rules for Application of Subsections (b) and (c).*—For the purposes of subsections (b) and (c)—

(1) *Amounts Distributable Out of Income or Corpus.*—In cases where the amount paid, credited, or to be distributed can be paid, credited, or distributed out of other than income, the amount paid, credited, or to be distributed (except under a gift, bequest, devise, or inheritance not to be paid, credited, or distributed at intervals) during the taxable year of the estate or trust shall be considered as income of the estate or trust which is paid, credited, or to be distributed if the aggregate of such amounts so paid, credited, or to be distributed does not exceed the distributable income of the estate or trust for its taxable year. If the aggregate of such amounts so paid, credited, or to be distributed during the taxable year of the estate or trust in such cases exceeds the distributable income of the estate or trust for its taxable year, the amount so paid, credited, or to be distributed to any legatee, heir, or beneficiary shall be considered income of the estate or trust for its taxable year which is paid, credited, or to be distributed in an amount which bears the same ratio to the amount of such distributable income as the amount so paid, credited, or to be distributed to the legatee, heir, or beneficiary bears to the aggregate of such amounts so paid, credited, or to be distributed to legatees, heirs, and beneficiaries for the taxable year of the estate or trust. For the purposes of this paragraph “distributable income” means either (A) the net income of the estate or trust computed with the deductions

allowed under subsections (b) and (c) in cases to which this paragraph does not apply, or (B) the income of the estate or trust minus the deductions provided in subsections (b) and (c) in cases to which this paragraph does not apply, whichever is the greater. * * *

* * * * *

(26 U. S. C. 1946 ed., Sec. 162.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.162-2. ALLOCATION OF ESTATE AND TRUST INCOME TO LEGATEES AND BENEFICIARIES.—(a) *Allocation among annuitants*.—Section 162(d)(1) applies to all cases in which the executor or trustee can or must (for example, by the terms of the trust instrument or will) pay the whole or any part of a gift, bequest, devise, or inheritance out of other than income, except that no income is to be allocated under it to a legatee, heir or beneficiary of a lump sum gift, bequest, devise, or inheritance. It applies in all cases of annuities where any deficiency in the amount to be paid can be made up by a payment out of corpus of the trust. It also applies in cases where amounts are to be paid or credited at intervals and the executor or trustee has discretion whether to pay or credit such amounts out of income or corpus, regardless of the source (income or corpus) to which the executor or trustee attributes such amount. If an annuity is paid, credited, or to be distributed tax-free, that is, under a provision whereby the executor or trustee will pay the income tax of the annuitant resulting from the receipt of the annuity, the payment of or for the tax by the executor or trustee will

be income to the annuitant under the rules of section 162(d) to the extent such payment is treated thereunder as out of income.

The method of allocating income of the estate or trust for its taxable year in cases to which section 162(d)(1) applies is as follows: The aggregate of all amounts which can be paid, credited, or distributed out of other than income (except under a gift, bequest, devise, or inheritance not to be paid, credited, or to be distributed at intervals) is obtained. The aggregate of such amounts is considered to be paid, credited, or distributed in such cases out of income of the estate or trust for its taxable year if it does not exceed the distributable income of the estate or trust for its taxable year. If the aggregate of such amounts does exceed the distributable income of the estate or trust for its taxable year, the portion of such amount paid, credited, or to be distributed to a legatee or beneficiary is considered income of the estate or trust for its taxable year which is paid, credited, or to be distributed in an amount which bears the same ratio to the amount of all distributable income as the amount so paid, credited, or to be distributed to the legatee or beneficiary bears to the aggregate of such amounts so paid, credited, or to be distributed to such legatees or beneficiaries for the taxable year of the estate or trust. The proportion stated in the preceding sentence applies only to legatees or beneficiaries of amounts which can be paid, credited, or distributed out of other than income of the estate or trust and, in computing such proportion, the amount of any gift, bequest, devise, or inheritance not to be paid, credited, or distributed at intervals is not to be included.

No. 12588

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MARGARET BRYAN SMITH,

Appellant,

vs.

HARRY C. WESTOVER, UNITED STATES COLLECTOR OF INTERNAL REVENUE, SIXTH COLLECTION DISTRICT OF CALIFORNIA,

Appellee.

REPLY BRIEF FOR APPELLANT.

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REPLY BRIEF FOR APPELLANT.

Summary of Argument.

State law is controlling in establishing the incidents and characteristics of a trust and the Federal taxing authorities are governed by State construction of state provisions. Whether or not the Congress could constitutionally provide for a complete disregard of State Law concerning trusts, contracts and Wills, the Statute (I. R. C. Sec. 162 (d)(1)) has not done so here. Concededly the taxpayer is not the recipient of income here, but the tax assessed against the taxpayer is on the income received by the trust measured by the corpus distributed to the taxpayer. This is merely taxing one taxpayer on income received by an-

other without any of the considerations that underlay cases like *Helvering v. Clifford*, 309 U. S. 331, or *Helvering v. Stuart*, 317 U. S. 154.

The Sixteenth amendment to the Constitution applied only to income tax, and did not itself authorize any taxation of gifts of principal such gifts. They may be taxable as gifts under the provisions of estate and gift tax law not constitutionally within the purview of the Sixteenth Amendment's authority, but they cannot be so taxed as *income*.

ARGUMENT.

I.

For Purposes of State Law Income as Received by the Trust Became Corpus and There Was Never Any Income Currently Distributable.

Appellee concedes that under California law the trust is valid and that income as received becomes corpus as it is received by the trust and so there is never any income available for distribution. He however takes the position that the California law is irrelevant and that constitutionally and under the Internal Revenue Code distributions of a fixed share of the corpus can be taxed as if they were income receipts. (Br. pp. 11-12.) The question here reduces itself then to the propositions whether I. R. C. Sec. 162(d)(1) authorizes the taxation of periodic payments setting aside portions of corpus to appellant, and whether, if the statute is given such meaning and application, it can be so applied constitutionally.

II.

Appellant Is Under the State and Federal Law the Recipient of Corpus and Is Not Taxable on Her Receipt.

In answering the contentions of appellee to the effect that the Statute (I. R. C. Sec. 162(d)(1)) with which we are dealing, or at least the statute plus the Treasury Regulations (Treasury Regulations 111, Sec. 29.162-2) impel a determination that the payments Appellant received are taxable as income, it is respectfully submitted that there is nothing so compelling therein. Apposite may be a statement by Lloyd W. Kennedy in his text on Taxation of Trusts and Estates. He says (Kennedy, Federal Income Taxation of Trusts and Estates (1948), Sec. 2.12, p. 160),

“SEC. 162(d)(1) consists of four sentences, the first three of which are about as distressing to the understanding as any three sentences ever sponsored by a presumably august body as the Congress of the United States.”

The question here is not what Congress hoped to do, or what Appellee wishes they had done, but what they actually did. Mertens in commenting on this section bears out this contention, stating that Congress did not choose to disregard state law or the language of trust instruments. The author states as follows (Mertens, Law of Federal Income Taxation, Vol. 6, Sec. 36.41a, p. 320):

As to what, generally, constitutes “income” as contrasted with corpus, the regulations come up with a bastardization leaving much to be desired, the statute itself being no clearer in the matter. It does not expressly disregard quirks and variances in state law or absurdities in trust instruments as to what shall constitute “income” and what “corpus.” It does not

say, in dealing with distributions out of "other than income," what the "other than" is that Congress had in mind. By sins of both commission and omission it leaves a considerable range of controversy which the regulations only attempt to deal with as follows: They say that "income" as used in the broader sense must be determined in accordance with the following principles:

"First, such 'income' means, in general, the amount which under the applicable law of estates and trusts is considered income available for distribution to the life tenant, legatee, or beneficiary, as the case may be."

We do not here have a "Clifford doctrine" situation (*Helvering v. Clifford*, 309 U. S. 331), where exceptional and unusual facts establishing control in the grantor and the possibility of avoidance of income taxation led to a result in which judicial legislation played a considerable part. And even within the field of the *Clifford* case, 309 U. S. 331, *supra*, it has been often limited and distinguished and the importance of state law concerning the meaning and validity of trusts is recognized. (See *Robert P. Scherer*, 3 T. C. 776.) Such a case is *May Chandler Gooden*, 12 T. C. 817 (1949), where the court followed *Lady Marian Bateman*, 43 B. T. A. 69 (aff'd 127 F. 2d 266 *sub. nom. Commissioner v. Bateman*) and relied on *Bixby v. California Trust Co.*, 84 A. C. A. 297, 190 P. 2d 321 (1948), as it then stated the law of California, in determining revocability of the trust and the powers of the beneficiaries to control the trust. The court distinguished *Helvering v. Clifford*, 309 U. S. 331, *supra*, and *Stanley J. Klien*, 4 T. C. 1195.

Thus we see that state law is not to be lightly disregarded. Too much is sometimes assumed concerning the unimportance of state law regarding trusts and *Helvering v. Clifford*, 309 U. S. 331, *supra*, and kindred cases are sometimes cited as if they had removed all relevance of state law from this field of income taxation. Mertens (*op. cit.* p. 504) notes that many trusts have weathered the storm of the *Clifford* doctrine and cites numerous cases. Thus, it is seen that the *Clifford* case and other cases cited by Appellee (Br. p. 14) merely recognize the doctrine as set out in the quotation from *United States v. Phellis*, 257 U. S. 156, 168, to the effect that substance and not form is important in deciding income tax questions. The case of *Anderson v. Wilson*, 289 U. S. 20, 27, cited by Appellant in her opening brief (Br. p. 21) deals with the two questions that are basic to the questions here. It (pp. 24-26) considers the application of state law to the facts and then proceeds, after determining the nature, the interest, and title of the trustees, to apply the Federal income tax law in the light of the interpretation given by state law. A trust is an entity set up and governed by state law, and though an "abstraction" the court treats it separately for tax purposes in accordance with law.

In general state law must be looked to for definitions of trust income and corpus and for the validity and interpretation of trust provisions. After determining these matters in accordance with state law, then the Internal Revenue Code provisions, with the help of the Treasury Regulations are applied thereto. In discussing this matter and the effect of Internal Revenue Code 162(d)(1) Mertens says (*op. cit.*, Sec. 36.41a, pp. 315-16):

"The beneficiary's rights in an estate or trust are by no means measured in terms of taxable income.

They depend upon local law and the terms of the governing instrument. Though he is an income beneficiary or annuitant, that does not mean that he is entitled to a certain amount or share of taxable income, but only that he is entitled to share in income as contrasted with corpus, and the extent of his rights may be affected by local law, discretion of the fiduciary or the court before which the administration is pending, or the terms of the particular will or trust in its treatment of what shall constitute income or corpus and how charges and expenses shall be allocated as between them. Generally speaking, no one can be taxed with respect to income which is not his or over which he does not have control tantamount to ownership."

It has been argued that I. R. C. Sec. 162(d)(1) (at least as applied by the Commissioner) has set up a conclusive presumption. This, basically is what the sought for interpretation of the section means. As is stated in Mertens, *Law of Federal Income Taxation*, Vol. 6, Sec. 36.41a, p. 317:

"In an attempt to clarify the situation a 1942 Amendment of the Statute sets up what appears to be at first glance an attempt to create a conclusive presumption that a distribution is out of 'income' to the extent that it could be out of 'income'"

The cases of *Heiner v. Donnan*, 285 U. S. 312, and *Schllesinger v. Wisconsin*, 270 U. S. 230, deal with conclusive presumptions that a gift given within a fixed period

of years preceding death was given in contemplation of death. The Court said in *Heiner v. Donnan*, 285 U. S. 312, 325, in discussing the *Schlesinger* case,

“The Schlesinger Case has since been applied many times by the lower federal courts, by the Board of Tax Appeals, and state courts; and none of them seem to have been at any loss to understand the basis of the decision, namely, that a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the 14th Amendment.”

The court then states that the fact that it is the Fifth Amendment that is involved makes no difference. The Court then quotes with approval from *Hoeper v. Tax Commission*, 284 U. S. 206 (a state tax case) as follows (p. 326):

“At page 215 we said: ‘We have no doubt that, because of the fundamental conceptions which underlie our system, any attempt by a state to measure the tax on one person’s property or income by reference to the property or income of another is contrary to due process of law as guaranteed by the 14th Amendment. That which is not in fact the taxpayer’s income cannot be made such by calling it income.’”

The *Hoeper* case involved a statute of Wisconsin that provided that the income of the wife should be added to that of the husband in computing the income tax assessable to and payable by the husband. The analogy to the instant

case is clear. To tax a part of the income of a trust to a beneficiary because the trust acted as a conduit in delivering the income to the beneficiary is one thing; it is quite another to proportion a corpus distribution to income received by a trust and tax the beneficiary on the trust income measured by corpus distribution.

One fact that must not be lost sight of here is the fact that no income is kept on tap, or in "cold storage" as it were, and later handed over to the beneficiary. Here income has lost its character as such and only corpus is on hand to be distributed.

We thus see that the cases set forth above establish the proposition that taxation of one person on income of another violates due process of law and that taxation of items not received as income is not authorized by the Sixteenth Amendment.

The development of the law as typified by *Helvering v. Clifford*, 309 U. S. 331; *Commissioner v. Court Holding Co.*, 324 U. S. 331; *Helvering v. Stuart*, 317 U. S. 154, and *Corliss v. Bowers*, 281 U. S. 376, does not disturb this basic proposition that the taxation of one person on income of another is unconstitutional. These cases, and many more dealing with similar special fact situations are all based, in the end, on the proposition that the person sought to be taxed is the substantial owner of the income in a practical sense. The *Clifford* cases base this finding of ownership on the substantial elements of control retained by a grantor of an *inter vivos* trust, and the shortness of the trust term. This is of course a question of fact in

each case. The *Tower* case, 327 U. S. 280, *supra*, is a family partnership case and depends on the elements of control by the head of the family and the substantiality of the interests of the wife as partner and the reality of her services to the partnership.

The case of *Corliss v. Bowers*, 281 U. S. 376, is another donor case where control of trust property was retained. Again, the principle was applied to a different type of factual situation in *Commissioner v. Court Holding Co.*, 324 U. S. 331, where a corporation was taxed as having made the sale of its sole asset despite the fact that in form the sale was made by the two stockholders (who were husband and wife).

The case of *Burchenal v. Commissioner*, 150 F. 2d 482 (C. C. A. 6, 1945), held that the mere fact that the Revenue Law treats capital net gain as taxable income, does not prevent this gain from becoming part of the corpus of the estate upon its realization, citing *Helvering v. Butterworth*, 290 U. S. 365, and *Burnett v. Whitehouse*, 283 U. S. 148. The Court said that such gain was actually part of the corpus and could not be properly credited as income. The Court relied on the law of the State of Ohio which held such gain to be corpus. The case of *Carlisle v. Commissioner*, 165 F. 2d 645 (C. C. A. 6, 1948), did not change this rule, it merely held that if this same gain was within the year distributed to the trust beneficiary, then it could be treated as income in his hands. If this gain had not been distributed, a contrary result would follow, as in the instant case where the income was not distributed.

III.

Legislative History Does Not Impel a Finding That the Congressional Purpose Was to Tax the Beneficiary in the Instant Situation.

Appellee cites the House and Senate Committee reports, to demonstrate how I. R. C. Sec. 162(d)(1) should be interpreted, and to support the language in Treasury Regulations 111, Sec. 29.162-2. The House Report said (H. Rep. No. 2333, 77th Cong., 2d Sess., p. 1 (1942-2 Cum. Bull. 372, 408)), "Where the amounts to be distributed are a charge upon the corpus as well as income, to the extent the payments are made from income they will be taxable to the beneficiary and will constitute a deduction to the trust."

The Senate Report is cited by Appellee as authority for his position. However, the Court's attention is respectfully called to some additional language in the report at page 560 (S. Rep. No. 1631, 77th Cong., 2d Sess., p. 72 (1942—2 Cum. Bull. 504, 560)):

"The aggregate of such amounts is considered to be paid, credited, or distributed in such cases out of income of the estate or trust for its taxable year if it does not exceed *the distributable income* of the estate or trust for its taxable year." (Italics supplied.)

Also the term income is defined further along on page 560, as follows:

" . . . 'income' means, in general, *the amount which under the applicable law of estates and trusts is considered income available for distribution to the life tenant, legatee, or beneficiary, as the case may be.*"

If no distributable income was available the payments to appellant cannot be considered as "out of income." The

quotation last above from the Senate Report is a clear direction to the taxing authority to look to the applicable state law for a determination as to whether a particular fund constitutes income or corpus.

Conclusion.

Finally it is respectfully submitted and reiterated on behalf of the Appellant:

I.

That (I. R. C. Sec. 162(d)(1)) does not apply to Appellant and if so applied such application is unconstitutional.

II.

That by established Federal law, including both statutory and case law, the Commissioner is bound to recognize the law of California concerning wills, trusts and contracts, and having made such recognition is bound to hold that there is no income available for distribution to her, and that therefore, no tax should be laid on distribution of the corpus to the Appellant.

III.

That legislative history does not impel a contrary conclusion.

The decision of the Court above is erroneous and should be reversed.

Respectfully submitted,

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